United States Court of Appeals

for the Second Circuit

APPENDIX

74-1694

United States Court of Appeals
FOR THE SECOND CIRCUIT

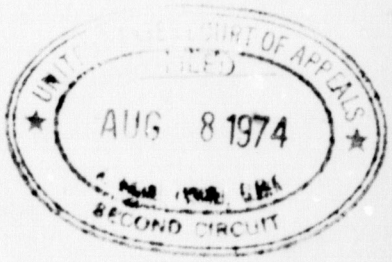
TITAN GROUP, INC.,

Plaintiff-Appellant,

against

HAROLD FAGGEN,

Defendant-Appellee.



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AFTERNOON SESSION

2:15 p.m.

MR. POWERS: Your Honor, Mr. Rohn is on his way back from lunch. I went on ahead. They are waiting for his check. I have a witness here. Mr. Cooper has agreed to take him out of order to keep the ball rolling along.

THE COURT: Very good.

MR. POWERS: I would like to call Mr. Kurt Grunebaum to the stand, please.

K U R T H . G R U N E B A U M , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Grunebaum, what business are you in, sir?

A I'm in the investment banking business.

Q What is the name of your firm?

A New York Hanseatic Corporation.

Q What position do you hold in that firm?

A I'm honorary chairman.

Q Honorary chairman. Are you the principle stockholder of New York Hanseatic?

A Yes.

Q How long have you been connected with New York Hanseatic?

A Since 1941 or '2.

Q I see. Mr. Grunebaum, were you a director of Titan Group?

A Yes.

Q Can you state the period within which you were a director of Titan Group?

A I think from 1960 to 1969.

Q And --

A It was first the Futterman Corporation.

Q And Mr. Grunebaum, did you hold any office in Titan other than being a director?

A To the best of my recollection, no.

Q Were you on the executive committee?

A I really don't remember.

Q Mr. Grunebaum, I take you back to 1968 --

THE COURT: Excuse me, Mr. Powers. Now that I hear that he was not a member of the executive committee or, more accurately, he did not remember, may I suggest that if this is going to be the same kind of testimony we have already elicited from a number of other directors, I was wondering if you would not perhaps agree with Mr. Cooper that he would testify substantially to the same effect as, for example, Mr. Casey this morning.

MR. POWERS: Would you care to so stipulate, Mr.

Cooper?

MR. COOPER: There's one other point. I will stipulate to that, but there is one other point I would want to elicit from the witness, your Honor.

THE COURT: Well, then I would leave it to Mr. Powers; understanding that he would stipulate --

MR. POWERS: I may stipulate to the other point he wants to stipulate to. If he tells me what it is, we can save time.

THE COURT: I'm not sure he would want to do so.

MR. COOPER: I don't think there is any mystery about it. Both Mr. Powers and I had an opportunity to talk to Mr. Grunebaum. I understand Mr. Grunebaum would testify that the memorandum hadn't been distributed to the Board, he didn't get a copy of the memorandum --

MR. POWERS: I would like to object to this, your Honor, we are stipulating and we have a witness under oath on the stand and I don't think it is --

THE COURT: All right.

MR. COOPER: I withdraw it.

THE COURT: All right. We will go ahead.

BY MR. POWERS:

Q Mr. Grunebaum, if I showed you a copy of some minutes dated December 2, 1968, of the Executive Committee of

Titan Group, Inc., would they refresh your recollection on whether or not you were on the Executive Committee in 1968?

A As it says there, yes.

Q You were on the Executive Committee in 1968; is that correct?

A Yes.

Q Mr. Grunebaum, I want to take you back to the fall of 1968 and ask you when was the first time that you heard about the proposed acquisition of the Faggen Companies.

A I don't remember the date.

Q Did you have any discussion on the acquisition of the Faggen Companies before the Board of Directors' meeting on October 2nd when the acquisition was tentatively approved?

A I think Mr. Robinson, who was Chairman of the Board, mentioned it briefly to me.

Q I see. I take you to the Board meeting where it was approved. You were present at that Board meeting, weren't you?

A Yes.

Q Would you state what was said about the Faggen Companies at that Board meeting that you recall?

A The business of the Faggen Companies was described. A projection of earnings was given. The liquid

assets were mentioned, liquid assets, I mean stocks and bonds, and the future and the importance for the Titan Company to diversify into other fields.

Q What earnings figures, if any, were mentioned at that Board meeting?

A Mr. Powers, you know it is quite a number of years ago.

Q Yes.

A And if my memory is correct, no written statement was handed out but a presentation was made by the then president, Mr. Frank, and he, to the best of my recollection, mentioned that if the Titan Corporation would have owned at that particular time the Faggen Corporation, the earnings would be in the neighborhood, I think, between 450 and 500 thousand dollars.

Q Now, in that connection, do you recall any statement at the meeting about computer capability of the Faggen Companies?

A Yes.

Q What was said on that subject?

A That they had computer capabilities and they would like to expand the business.

Q Do you recall any statements on their clients, the customers and clients of the Faggen Companies?

A To the best of my recollection, mainly pension funds and similar unions. Those two I remember.

Q Thank you very much.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Grunewald, just one question. You spoke of the assets of the Faggen Companies. Do you have any recollection of any discussion as to what liquid portfolio or assets the Faggen Companies had at that time?

A Between one million and one million and a half.

Q Can you describe for us what the condition of Titan was at that time with respect to cash and the need for cash?

A We always had need for cash at that time, as long as I was on the Board.

Q With respect to your particular attitudes towards this acquisition at that time, was the liquid asset position of the Faggen Companies of importance to Titan at that point?

A Yes, it was of importance, but it was one of the various factors which --

Q Which entered in your judgment?

A Yes.

Q That's all. Thank you.

MR. POWERS: Could we state, Mr. Cooper, that

Mr. Grunewald won't have to be recalled again? When I asked him to testify today, he asked me if he could testify without coming back to court again because I think you subpoenaed him, too.

MR. COOPER: Yes.

MR. POWERS: You are excused, sir. Thank you very much.

(Witness excused.)

MR. POWERS: Can we call Mr. Rohn back to the stand?

THE COURT: Yes, you can, but in an effort to save some time, may I suggest to you more particularly, Mr. Powers, that we have had a number of these directors and I see no reason in repeating the same thing.

MR. POWERS: There are no more to call, sir.

THE COURT: I am glad to hear that. By this, of course, I do not mean to suggest anybody from the Executive, but that is another problem, but anybody of the kind of Mr. Grunewald or Mr. Casey and the others who have been here in the last day, I think we should not have any more.

MR. POWERS: Yes, sir, I had no intention of calling any others.

THE COURT: Good.

MR. POWERS: Mr. Rohn, could you take the stand,

please.

F R E D R O H N , resumed.

MR. POWERS: Your Honor, before I start redirect on Mr. Rohn, Mr. Cooper asked us to produce some material at the beginning of trial. It is here, it was here before we went out to lunch, and I would like to make sure Mr. Cooper has everything he wants before I complete with this witness because I have a few brief witnesses.

Now, Mr. Cooper, what is it you would like and we will give you whatever we have here.

MR. COOPER: I asked Mr. Castrovinci if he would assemble for me the information regarding the pension funds, the net asset values and the liabilities of the pension funds for the years 1965 and forward. And he said he will try to do that during the lunch period. Now --

MR. POWERS: I think it is done. You asked him directly. I had no problem with Mr. Castrovinci talking with you.

Give him whatever you have, Mr. Castrovinci.

THE COURT: You say you have three or four questions of Mr. Rohn?

MR. POWERS: Yes, sir.

THE COURT: We won't hold you strictly to it.

MR. COOPER: Your Honor, can I also expedite this?

I had the exhibit of the Brandenberg memorandum with Mr. Levine's name on it. Mr. Levine is here and I was wondering if we might also expedite that and have Mr. Levine identify that for us now so that if I have any recross and Mr. --

MR. POWERS: No problem. Mr. Levine, this is a memo that was presented. It has been marked K for identification. And we would like that authenticated, if you have ever seen it before and know what it is.

MR. LEVINE: Yes.

THE COURT: Look, Mr. Levine is speaking as just a member of the audience. May I remind you we have another witness in the box.

Now, let's move ahead, gentlemen. We will get to Mr. Levine when we finish Mr. Rohn.

MR. POWERS: So I take it, Mr. Cooper, we are finished, we have given you everything you asked for.

MR. COOPER: I don't know.

THE COURT: Let's not debate that. We have more debates. Let's go ahead with Mr. Rohn. I don't want to repeat that again, Mr. Powers.

REDIRECT EXAMINATION

BY MR. POWERS:

Q I show you Exhibit J, Mr. Rohn. Could you tell the Court what that document is?

A Yes, this Exhibit J is the typed individual and combined sheets of the Faggen Division of Titan at September 30, 1968, and December 31, 1968. In the upper righthand corner it appears as if the accountant who had it in his files had so identified it. It says "Work paper number," or WP number, which obviously stands for work paper number. It is L1, and it says under the next line, "Accountant." Then there's the word "client -" it looks like Krowl -- Croll. That would, from an accountant's work paper standpoint, indicate --

Q Wait just a minute. The Court is busy.

(Pause)

THE COURT: I am sorry.

Q The pending question is, what is that document, Exhibit J?

A Shall I start my answer again, Mr. Powers?

Q Yes. But as briefly as possible.

THE COURT: This is not the first time we have heard of it.

Q Who prepared the document?

A It appears it was prepared by the client. It was inserted as part of the work papers of Mr. Croll, whomever he is.

MR. COOPER: I object to that, if your Honor

please. He didn't prepare it, how would he know?

THE COURT: Again, I think we have covered this before, but you correct me, Mr. Rohn: As I recall it yesterday, you didn't know of your own knowledge who prepared this; isn't that so?

THE WITNESS: Yes, I don't know who prepared it.

THE COURT: Then I think we should not go into this any further, Mr. Powers. Come on.

MR. POWERS: If I could make it clear, your Honor.

Q Is there an identifying technique which accountants use to show the source of a document as a system which they annex to each document in their possession from a client or from any other source?

MR. COOPER: Objected to.

THE COURT: Look, Mr. Powers, I see nothing particularly wrong except it is unnecessary from your point of view. We will get to J later. No one is accusing Mr. Rohn of having had anything to do with it.

MR. POWERS: My point is just to make it clear Titan prepared and gave it to Mr. --

THE COURT: I know. Let's not badger Mr. Rohn about it.

Q Mr. Rohn, in connection with your preparing this Exhibit 10, the net income pretax exhibit which you testified

to previously, you were asked a question by Mr. Cooper as to why you said that vacation pay was not booked; do you recall that question?

A Yes.

Q When you were asked that question, when the phrase "booked" was used, did you mean that to include booked, that is, entered, with respect to income of the Faggen Companies?

MR. COOPER: I will object to the form of the question, your Honor.

THE COURT: I must say it baffles me. Could we--

MR. POWERS: May I rephrase it? Perhaps I could make it clear.

THE COURT: I wish you would.

MR. POWERS: Thank you.

Q Mr. Rohn, I call your attention to the Joseph Warren statements which were shown to you previously; do you recall that?

A Yes.

Q Now, they show a liability on the balance sheet for some 29,000 in vacation pay as of September 30th; is that right?

A I really would like to see it again.

MR. POWERS: Could I have those, Mr. Cooper? You

gave those to the witness before.

Q My question to you is, does that financial statement by Joseph Warren show a $25,000 liability for accrued vacation pay?

A The liability is $59,000, Mr. Powers.

Q $59,000?

A Yes.

Q Does the presence on that balance sheet of a $59,000 liability as of September 30, 1968, mean that that liability was reflected by Mr. Faggen in Exhibit 1, which you previously have seen or in Mr. Faggen's tax returns, which you have previously seen?

A No, it doesn't.

Q Was that liability for $59,000 reflected as a charge against earnings of the Faggen Companies in either Exhibit 1 or in the tax returns of the Faggen Companies?

MR. COOPER:: I'll object to its inclusion with respect to Exhibit 1, your Honor.

MR. POWERS: Let me rephrase the question.

Q Was that $59,000 liability included as a charge against income in the Faggen tax returns?

A I was not able to find any such item.

Q All right. I show you Exhibit 1. Is that $59,000 accrual for vacation pay reflected as a deduction

from income anywhere on Exhibit 1?

A No, sir.

Q That was a $59,000 deduction from income, wasn't it? Excuse me, that was a $59,000 charge against income, wasn't it?

A At some point it would have been, yes.

Q Yes. Now, in that connection, do you know of any arrangement for the handling of that accrued vacation pay item which was made at the closing or in connection with the contract for the Faggen Companies?

A I don't recall it offhand. You would have to refresh my memory.

Q Let me show you a memorandum which is contained in our big volume here to see if this refreshes your recollection.

THE COURT: While he is looking for that, Mr. Rohn, I take it that all along somebody has made clear to you the provisions of the acquisition contracts here, most particularly the representations and warranties of a financial nature, consisting of really basically two matters: some tax returns of the Faggen Group and a balance sheet as of September 30, 1968, reflecting the quarter previous thereto, as prepared by this firm called Joseph Warren. Did you ever read the covering or transmittal letter with that material?

THE WITNESS: Yes, I did.

THE COURT: Are you particularly aware of the comment or statement in that letter to the effect, and I read you as follows: "The income is overstated because and to the extent that the opening balances on an accrual basis haven't been taken into account." You were aware of that?

THE WITNESS: Yes.

THE COURT: Are you also aware that there does not appear from the face of the contract that the seller was making any representations to projected earnings, whether the books were kept on a cash basis or an accrual basis or a melange of both?

THE WITNESS: I'm not sure I understand your question, your Honor.

THE COURT: Do you recall seeing anything in the contract document shown to you, either by Mr. Williams or counsel for the Titan Group here, Mr. Powers or anyone else, indicating that there were any other financial representations or warranties coming from the seller to Titan in these acquisitions?

THE WITNESS: I don't recall any, sir, no.

THE COURT: Therefore you would agree, would you not, that you have given no information to show that at least, as a matter of contract terms, that the seller was asked to

or in fact did make any representation as to projected earnings?

THE WITNESS: I would agree with that statement.

THE COURT: Is there anything else, Mr. Powers?

MR. POWERS: One thing, your Honor.

BY MR. POWERS:

Q I show you Exhibit 14 for identification and ask you if you have ever reviewed that memo before.

xx (Plaintiff's Exhibit 14 marked for identification.)

Q My question is, sir, does that refresh your recollection on the handwriting of the vacation pay item at the closing of the Faggen transaction?

MR. COOPER: If your Honor please, he didn't say he needed his recollection refreshed as to the item. He said he didn't know whether he had seen the document.

THE COURT: Well, I certainly agree to this extent: I think the first inquiry, in other words, Mr. Powers, you apparently are going to offer this document.

MR. POWERS: Yes.

THE COURT: Or whatever you are going to do. Give Mr. Rohn a chance to tell us what he knows about it.

THE WITNESS: I was aware of the information in here. I don't recall exactly when I saw this or if I saw

this memorandum in this form or not. But the information was available to me.

Q What is the information that was available to you?

A Well, the crux of it on the accrued vacation pay was that Mr. Faggen advised me, which in this case is Mr. Russo, that it was his feeling that accrual should be eliminated and to this end he has stated that he will sign a statement waiving his right to demand payment of the amount included in the accrual schedule as due him. In parenthesis, $18,413. That he will satisfy any claim which Rose Dogan may make for the amount shown as due to her.

Q I don't quite follow that last statement you made. Mr. Faggen is satisfying the obligation insofar as Rose Dogan is entitled to it?

A That's the way I --

MR. COOPER: If your Honor please, the document will speak for itself. I don't think that is the question. The question is, did he see it.

THE COURT: That has already been answered.

MR. POWERS: May I offer the document in evidence, your Honor?

THE COURT: You may offer it.

MR. COOPER: I'm going to object to the introduction of this document.

MR. POWERS: Your Honor, it is offered only for the limited purpose of the first paragraph entitled, "Accrued Vacation Pay," for no other purpose.

THE COURT: I think the real problem is this: Mr. Rohn has told us that he may have seen it but he doesn't know that he has seen it. That is number one. Number two, we do not know who drew this. It appears to have been drawn from a man named Russo, who was already a witness here, and if you thought it was so important then, perhaps you should have asked Mr. Russo about it.

But on this state of the record, on redirect I point out to you that there is no real basis for admitting such a document.

MR. POWERS: Yes, sir.

Q Now, I show you Exhibit 12, which has already been admitted, Mr. Rohn, the cash and securities transfer to and from Titan. Does Exhibit 12 give effect to any treasury notes which were in the possession of the Faggen Companies at the time they were acquired by Titan?

A Yes, it does.

Q In what way does it give effect to those?

A It is included in the cash item. I refreshed my recollection over the lunch break and find it is in that figure.

Q When you say it is included in that figure, do you mean by that that ultimately the treasury notes were converted to cash and what the cash account says is being transferred to Titan includes those proceeds?

A That is correct.

Q Are you further stating that the net figure on this schedule, Exhibit 12, gives effect to all cash transferred to Titan and all cash transferred to Mr. Faggen and Rose Dogan for the period encompassed by that exhibit?

A To the best of my knowledge, that is correct, yes.

Q Is there any inconsistency between Exhibit 12 and Exhibit J, which you were questioned on by Mr. Cooper, in that Exhibit J says there are 1,300,000 in marketable securities in the Faggen Companies?

A There's no inconsistency. The amounts, although they are different, are reconcilable in that the one million 019 that is so listed here does not include the treasury notes, nor does it include the Titan Group stock, which is shown as a separate line on it. Taking those three things into account, the matter -- the totals -- I believe the work papers will show reconcile to the figure that is shown on Exhibit J.

MR. POWERS: Thank you. Nothing further.

THE COURT: You are a most patient man, Mr. Rohn. You may be excused.

(Witness excused.)

MR. POWERS: Your Honor, may I call my next witness?

THE COURT: Sure.

MR. POWERS: I would like to call Mr. Abraham Zide to the stand, please.

A B R A H A M Z I D E , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Zide, what is your business?

A I'm director of the United Furniture Workers Insurance Fund and United Furniture Workers Pension Fund.

Q How long have you held those positions?

A The Insurance Fund for about twenty-nine years, the Pension Fund for about fifteen years.

Q Do those pension and welfare funds act for the national union or for particular locals of a union.

A National union.

Q Mr. Zide, do you know Harold Faggen?

A Yes.

Q Have you worked with the Faggen Companies in the

past?

A Yes.

Q How far back does the relationship between the pension and welfare funds, which you administer, and the Faggen Companies go in time?

A Well, previously it was Ramsey and Faggen. The Faggen Company itself didn't become existent until many years later.

Q Who is Ramsey?

A I believe it was a partner with Mr. Faggen.

Q Do you know his full name?

A David Ramsey.

Q Were your pension and welfare funds clients of the Ramsey and Faggen firm?

A Yes.

Q When did the firm become solely Harold Faggen's, if you know?

MR. COOPER: If your Honor please, I think this is totally irrelevant.

THE COURT: I am inclined to agree. The point really comes down to this, Mr. Powers, in what you are trying to get at but this is really, from your point of view, a little bit trivial, to put it mildly: That is not what you called Mr. Zide for.

Q Mr. Zide, I take you back to 1968. Did you participate in any conversations with Harold Faggen where Harold Faggen was present, on the subject of counsel for the Furniture Workers Pension and Welfare Plans?

A Yes.

Q Can you fix a date for the first such conversation?

A It was either in June or July of '68.

Q Can you tell us the place where the conversation took place?

A That was in the national office at 700 Broadway.

Q Who was present?

A Mr. Pizer, who was Chairman, Mr. Fred Fulford, who was secretary-treasurer, Harold Faggen and myself.

Q What was said by Mr. Faggen at that meeting?

MR. COOPER: Objection to it, if your Honor pleases.

THE COURT: Well, I am not sure I understand the nature of your objection because -- I assume you do not have to get all of the conversation.

Q What was said by Mr. Faggen on the subject matter of the meeting?

THE COURT: Can't we approach it a little differently? Get Mr. Zide in and out? Because really, I

tried to tell you several ways that this is a very, very shaky whip you are on as against the defendant in this case. Maybe others in other cases, but not here.

Mr. Zide, tell me, if you do not mind, what was the general subject matter or tenor of this meeting?

THE WITNESS: The general subject was the -- the United Furniture Workers to look for new couselors.

Q What did Mr. Faggen say, if anything, on that subject?

MR. COOPER: I object to the relevancy, your Honor.

THE COURT: I am going to hear it and then if it is irrelevant, I will strike it. But you know what is coming as well as I do and better. Go ahead.

Q What did Mr. Faggen say on that subject?

A He said that he would recommend the Robinson and Silverman firms since they were doing legal work for another union and since the firm was also doing legal work for Harold Faggen, and that they had twenty attorneys in their office as opposed to the one attorney that we had and that we would get superior service.

Q Now, who made the first mention of the Robinson law firm at that meeting?

A Since we didn't know Robinson from a whole in the

ground, it was Mr. Faggen.

Q What, if anything, transpired after that meeting on this subject?

A There were further meetings with respect to meeting the attorneys, set the fees and so on.

Q What did Mr. Faggen say at those further meetings, if you recall?

A I don't recall being at those meetings where they set the fees.

Q How many meetings were you present where Mr. Faggen recommended the Robinson law firm?

A I believe it was one or two.

Q Now, when did the Robinson law firm take on the Furniture Workers business?

A As of September 1, 1968.

Q In taking on that business, what specific clients did it take on?

A Well, it took on the United Furniture Workers Insurance Fund, the United Workers Pension Fund A, and the International itself, and I believe one local.

Q Can you state roughly the total legal fees that were agreed to be paid by those various entities in connection with that undertaking?

A At that time --

MR. COOPER: I object to that, if your Honor pleases.

Q If you know.

THE COURT: Just a moment. You want to know the legal fees when? For what period?

MR. POWERS: The annual legal fees which were agreed to be paid by this group of unions and pension and welfare plans which Mr. Zide was affiliated with, the total amount to be paid to the Robinson law firm.

THE COURT: First of all, was there some sort of annual retainer agreed upon, Mr. Zide, as you recall?

THE WITNESS: Yes, your Honor.

THE COURT: Roughly as best as you could recall, what was that, what range?

THE WITNESS: It was $1,250 a month for the Insurance Fund, and $1,000 a month to the Pension Fund. I don't know the figures for the International.

THE COURT: All right, sir.

Q Were there any other fees involved?

A I don't know any others.

Q And --

A That I had anything to do with.

Q I didn't hear you, Mr. Zide.

A Any other fees that I had to do anything with, I

don't know.

Q Mr. Zide, in the summer of 1968, did you have any conversation where Mr. Faggen was present on the subject of where the pension funds of the Furniture Workers Union and the pension and welfare plans should be located?

MR. COOPER: Objected to.

THE COURT: Did you have a conversation --

MR. POWERS: May I rephrase it, your Honor, referring to your observation?

Q Did you have any conversation with Mr. Faggen in or about the summer of 1968, on the subject of the pension funds for the various unions and pension and welfare funds you were affiliated with?

MR. COOPER: Your Honor, I object to it. It is not at all within the framework of these pleadings of this case.

THE COURT: What are we getting into?

MR. POWERS: Your Honor, it is a couple of questions. If you bear with me, I will be through with it. I think it is necessary to try to establish the facts.

THE COURT: This whole business seems so peripheral and so absurd from the Titan's Group points of view that I --

MR. POWERS: Your Honor, I am deferring to your

views but I feel I must try to establish this couple of facts with a few more questions; I'm almost done.

THE COURT: This will go on endlessly, and I do not think it helps Mr. Zide much. You must have something specific in mind.

Q Mr. Zide, did Mr. Faggen make a recommendation that the pension and welfare funds be transferred to the Chase Manhattan Bank from the bank they were in?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: You know, you have not sued that poor man that you had in here this morning who was an ex-vice president of Chase. I do not understand what you and your principal are up to.

MR. POWERS: May I establish these facts, your Honor?

THE COURT: Did there come a time that you recall, Mr. Zide, that either one of the two funds or both of them transferred their business to the Chase Manhattan?

THE WITNESS: No, your Honor, they were transferred from the First National City Bank to the Chase Manhattan.

Q Did you participate in any conversations where Harold Faggen was present where that subject was discussed?

A Yes.

Q Can you fix a date for those conversations?

A Well, that was in the later part of '68.

Q Was it in the summer or the fall?

A I think it was July or August.

Q Where was that meeting?

MR. COOPER: If your Honor please, I don't know what relevance all of this has.

THE COURT: I must say, honestly, Mr. Powers, if you can go around Dick's barn to do something you can do directly, you will go around thebarn. Now, if you want to bring out that Faggen recommended this --

MR. POWERS: Yes.

THE COURT: Why don't you ask him?

Q Did Faggen recommend this transfer?

A Yes.

Q And did you participate in a meeting with Ben Robinson and the Chase Manhattan Bank to discuss the subject of this transfer?

A Yes.

Q What reasons did Faggen give for recommending the transfer?

A Well, the officers of the funds felt that the First National City Bank rates were being increased above

what we should pay. And Mr. Faggen figured out that the rates that Chase Manhattan would charge would be less than the First National City Bank, and as a result the transfer was made.

Q Did you participate in a meeting where this was discussed at Chase Manhattan Bank?

A Yes.

Q What was the amount of the fund involved then?

A About nine million dollars in the pension fund and about nine million dollars in the insurance fund.

Q Were both Mr. Robinson and Mr. Faggen present at that meeting?

A Yes.

Q Who was there for Chase?

A Mr. Lindberg.

Q Did you ever have a dispute involving Harold Faggen personally?

A Well, we had no personal disputes. I had disagreements with him.

Q Was there ever a question raised as to the payment of your pension when you retire from the fund?

A Not directly with Mr. Faggen.

Q What was the nature of the question that was raised?

A Well, I don't understand your question, the nature. Who raised what?

Q What happened with respect to your pension when you retired from one of the funds?

A Well, before I filed an application for retirement, the local union which was -- of which I was a member and with whom I filed an application for a pension said that Mr. Faggen indicated that the contributions made to the 76B Pension Fund was not in accordance with IRS rules, and that they will withhold passing upon my application.

Q What did you do then?

A I retained an attorney, we initiated a suit, and the trustees and the attorney for the Pension Fund agreed that I was entitled and certain documents were signed which were made in court proceedings, and I have been receiving my pension since May 1, 1972.

Q Now, Mr. Zide, back in 1968, were the Faggen Companies doing any computer work for the Furniture Workers Pension and Welfare Plans?

A Yes.

Q What was the nature of the work they were doing in '68?

MR. COOPER: Your Honor, I don't know what this has to do with this case.

THE COURT: I really do not, either. It sounds like pure spite the more we hear of it.

MR. POWERS: This goes to the issue of the computer capabilities of the Faggen Companies as outlined in Exhibit 3 to be measured by what was being done for this client at the time and the quality of the services being done.

THE COURT: I tell you, you have an almost death wish about you. I do not understand it. Are you claiming that somehow this business was lost in 1968?

MR. POWERS: I'm claiming that the computer capability outlined in Exhibit 3 doesn't exist. It was mostly in Mr. Faggen's head. I'm attempting to show it by showing objective evidence of the nature and quality of the services being rendered to an important client at the time, in '68.

THE COURT: If you would settle down for a few minutes, enunciate carefully so the court reporter can get it; you will have to start over because, with all this, I do not understand you at all.

MR. POWERS: The purpose, sir, if your Honor would look at Exhibit 3, there's a statement by Mr. Faggen as to defining the computer capability --

THE COURT: Are you a computer expert, Mr. Zide?

THE WITNESS: No, your Honor.

MR. POWERS: But his firm bought the computer

service --

THE COURT: You spend more time testifying without benefit of oath in this case, Mr. Powers, and we have tolerated it up to a point, but we are not going to tolerate it much longer.

Please, I was asking a question of Mr. Zide who I would rather hear from than I would you, frankly, on this subject.

Were the Faggen Companies doing any computer work for you? And when I say "for you," I mean either for one of the funds or perhaps for the International or --

THE WITNESS: They did the computer work, printout work on the computer for the Insurance Fund and the Pension Fund.

THE COURT: I see.

BY MR. POWERS:

Q Now, Mr. Zide, in 1968, what was the nature of the work that they were doing?

THE COURT: Oh, please, that is the kind of question that just gives one the willi waws.

MR. POWERS: Let me rephrase it, your Honor.

THE COURT: You have a natural talent for rubbing everybody the wrong way. He is not a computer man. You have something else clearly in mind.

Incidentally, I am going to rule on all your objections once we get this out, Mr. Cooper, so don't worry about that.

I am going to give him the latitude. My real problem is I do not understand counsel most of the time with his questions.

Q I show you Exhibit 3 and I ask you to read the second page of it, the sentence that says, "We are in the process of programming completely automated pension plan calculations for small and medium size employers. We expect to provide these services to stockbrokers, accountants and lawyers only."

Now, in 1968, did the Faggen Companies handle a package pension plan for the Furniture Workers Union?

A A limited package.

Q How did it work? Was it functioning adequately in '68?

A Well, they were set up by Mr. Faggen himself and we find later on that the printouts, the information that we got, were not accurate.

Q And were there any complaints about the quality of the services in '68?

A Oh, yes.

MR. COOPER: Your Honor, I don't know how far you

want to let this go, but I have to make an objection to it.

THE COURT: I do not blame you. I do not blame you at all and I think this is going too far, particularly since I cannot be sure but what we are talking or attempting through Mr. Powers' questions to compare apples with oranges. Now, I am going to cut you off right now on this subject. This is -- I can only conceive -- is some motion of animus or spite leading you or your principals to insist on this kind of thing.

Let me make sure that I understand this, Mr. Zide: You were asked about whether you had some personal difficulties with your pension. Again, I could not understand the questions, really, but I gather there came a time when you retired.

THE WITNESS: Yes, your Honor.

THE COURT: When was that, sir?

THE WITNESS: Well, actually I didn't retire. I continued in my present employment. But I reached the age to which I was entitled to a pension.

THE COURT: Yes.

THE WITNESS: That was in 1972, your Honor.

THE COURT: Right. Did you have any dealings with Mr. Harold Faggen personally in that regard?

THE WITNESS: No, your Honor.

THE COURT: What in the earth are we doing, Mr. Powers? What was the point of all that?

MR. POWERS: Because Mr. Cooper has subpoenaed all of the records on his pension dispute simply to attempt to show some bias on the part of this witness, and I'm trying to meet the issue by getting the facts out on direct.

THE COURT: Let's not meet all of Mr. Cooper's machinations. That is not your job. Your first job is to try to prove something, approximating the charges that Titan has leveled against Faggen here.

Now, if we are going to anticipate everything in the western world happening, you are going to be a very busy boy indeed and I do not think you can stand up to it. No one could.

Now, let's go back to another subject, Mr. Zide. I take it that in 1968 the funds continued to do business with the Faggen Companies.

THE WITNESS: Yes, your Honor.

THE COURT: And whatever difficulties you had, you didn't terminate their relationship in supplying actuarial and computing services to the funds?

THE WITNESS: I made every effort to do so, unsuccessfully.

THE COURT: You did. But you were unsuccessful.

THE WITNESS: Yes, your Honor.

THE COURT: You did not think that the services of the Faggen Companies were adequate?

THE WITNESS: I did not.

THE COURT: All right. Anything else?

MR. POWERS: No, sir.

THE COURT: Do you want to cross examine?

MR. COOPER: Just one question, your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Zide, when Mr. Faggen recommended the Robinson firm, which as you testified, did you employ them in 1968?

A I didn't employ them. The organization.

Q I mean the funds.

A Yes.

Q Are they still the attorneys for those funds?

A Yes.

Q Has the fund found their services satisfactory?

A It is a question which I would like to do a little discussion.

Q Just yes or no. Are they -- withdraw the question. They are still the attorneys for the firm?

A They are still the attorneys for the fund.

Q And the reason for changing from First National City to Chase was because Mr. Faggen said that the rates at First National City were too high?

A Yes.

Q And were the rates at Chase lower?

A They were.

Q They were. So it was a benefit to the funds to transfer from First National to Chase?

A After what happened in the market in all these years, it is a question --

Q I'm talking about '68.

A For that particular date, yes.

Q Okay.

MR. COOPER: That's all, Mr. Zide.

THE COURT: Thank you, Mr. Zide. You may be excused.

(Witness excused.)

THE COURT: I must say, Mr. Powers, I am astonished. Do you really want to keep this kind of contention in the record?

MR. POWERS: Your Honor, I don't think it is appropriate for me to argue a legal issue to you at this point. I would like to continue and call Mr. Williams.

THE COURT: Well, there is a legal issue, whether you know it or not, because Mr. Burton Cooper has objected to all of this as being irrelevant.

MR. POWERS: May I then state why I have introduced this evidence?

THE COURT: I know it is in your pleadings, I know that. But the thought that this is proving a securities act case is something that just leaves me breathless.

MR. POWERS: Do you want to hear argument from me, your Honor, or shall I call my next witness?

THE COURT: Well, perhaps you and I ought to hear, first of all -- I am right, am I not, Mr. Cooper, in saying that you would like to strike all the testimony of Mr. Zide?

MR. COOPER: Yes, your Honor.

MR. POWERS: Then I would like to address myself to its relevance, if I may.

THE COURT: All right.

MR. POWERS: Your Honor, the steps that Mr. Faggen took prior to the negotiation of his contract were part of the softening process within the officers of Titan. One of those steps was to lend his weight with an important client of his, to give an important client to the Robinson law firm. One of the other steps was to help make Titan look good by transferring some pension funds to the Chase Manhattan Bank

where one of Titan's directors was also an officer.

Ultimately, this transaction was closed without any audit of the adjusting statements that Mr. Faggen gave.

THE COURT: I do not want all of that. May I point out to you that there is nothing wrong, certainly under the Federal Securities Law, to soften up a would-be purchaser. We are a nation of Willy Lomans, my boy, and never forget it. And your Byzantine ideas or those of your principals about how this is all something mysteriously illegal under the Federal Securities Laws baffles me.

MR. POWERS: Well, your Honor, when you look at sophisticated buyers like this --

THE COURT: Sophisticated buyers abound, my dear boy, and this kind of dealing goes on every day. It is going on as we sit here to the north of us and to the south of us and why you make such a big deal out of this makes me think that there is more to this than meets the eye.

MR. POWERS: Your Honor, I think your last comment --

THE COURT: Besides all this talk about conflict of interest, you forget that Harold Faggen was not involved in this as a lawyer. Perhaps Mr. Ben Robinson has a problem. I won't comment on that because he is not before the Court. But you keep putting in all these extraneous red herrings

which makes me thing that we do not really have anything in the middle to solidify things here.

I will tell you what I will do: I will reserve decision in fairness to you and your client, but I will tell you right now if ever I heard a lot of dubious razzmatazz in a 10(b)(5) case, this is it. Particularly from a witness like Zide who, to his every last continuing credit, admitted he cannot stand Harold Faggen.

But if you think that is the kind of stuff out of which solid cases are made, I will go along with you to the extent of continuing it in the record and then I will decide it at the end when I decide the whole case.

Now --

MR. POWERS: My next witness is Mr. Williams, your Honor.

THE COURT: Before we go to Mr. Williams, I must congratulate you, since I am free to criticize you, I have got to congratulate you when you do something. We have now heard from Mr. Rohn, we have heard from Mr. Zide, Mr. Russo, Mr. Frager, Mr. Hegy, plus a whole number that you didn't name on the evening of the 22nd of February. However, let me ask you about Mr. Basil Castrovinci.

MR. POWERS: He is here in the courtroom, your Honor, I'm ready to begin --

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THE COURT: And Miss Theresa Farkus.

MR. POWERS: She is unavailable until the 18th by reason --

THE COURT: Until the 18th of what?

MR. POWERS: Of March. By reason of the delay in the trial she left town on a business and personal vacation. So I'm going to replace that testimony with another witness that I have here ready to go.

THE COURT: All right. Now, you mean, in other words, we are having still more --

MR. POWERS: In place of Miss Farkus.

THE COURT: All right. How many more witnesses have you excluding Mr. Williams?

MR. POWERS: Let me check. I think just three more, Castrovinci, Ferrara and Mr. Frankel.

THE COURT: Castrovinci, Ferrara -- who is Mr. Ferrara?

MR. POWERS: He is an actuary and consultant employed by the Faggen Companies. Theodore Ferrara and a gentleman named Perlmutter, who is also employed by them. The two of them are to replace the Farkus testimony I planned.

THE COURT: All right. Let us go ahead with Mr. Williams.

WILEY HERBERT WILLIAMS, called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Williams, when did you begin work at Titan Group?

A July 1972.

Q Have you been there ever since?

A Yes, I have.

Q What office do you hold there?

A I'm treasurer of the company presently.

Q In July of 1972 what was your position?

A I was a controller.

Q Where did you work before you went to work for Titan?

A I was with Enduro Mills in Dalton, Georgia, the textile business.

Q How many years have you been in the accounting field?

A Since 1949.

Q Where did you go to college?

A Lemar Tech in Beaumont, Texas.

Q Are you from Texas, originally?

A I was born in Georgia and moved to Texas at an early age.

Q Mr. Williams, I take you back to the summer of 1968. Strike that. 1972. Did you have any -- did you do any work or have any discussions on the audit of the books of the Faggen Companies for the years 1968, '7, '6 and '5?

A My involvement was primarily in reviewing the work that William Sosa was doing for Mr. Hatcher.

Q Did you participate in conferences with Sosa?

A Yes. Occasionally.

Q Did you participate in conferences with Hatcher on that subject?

A Yes, on occasion.

Q Did you participate in the review and preparation that went into Exhibit 6, the Hatcher's affidavit, in this volume?

MR. COOPER: I'm going to object to the form of the question, your Honor.

MR. POWERS: Let me rephrase it.

Q I show you Exhibit 10 in evidence. Did you participate in any of the discussions leading up to the preparation of that back in 1972?

A Yes, I talked with William Sosa about his approach to putting the information together which went into this

schedule.

Q Since then did you prepare Exhibit 10 for purposes of this trial?

A Which is --

MR. COOPER: I object to the form of the question, your Honor.

Q This exhibit.

THE COURT: I overrule that.

A Did I prepare this exhibit?

Q Yes. By preparing, I mean have it physically typed up and put together for the trial.

A No, that was done back in August or September of '72.

Q Did you review that document prior to this trial?

A Yes.

Q Did you review the work papers that went into that document?

A Yes.

Q Did you review the various schedules and other accounting entries prepared by Sosa in connection with that document?

A Yes.

Q Did you review material by Hatcher prepared in connection with that document?

A Yes, Hatcher's was mainly questions directed to Sosa. I reviewed his questions and Sosa's answers to the questions as they related to this, yes.

THE COURT: Forgive me, Mr. Williams, but do I understand that this exhibit which we call Plaintiff's 10 was not prepared a few weeks ago, but it was prepared in August of 1972?

THE WITNESS: This exhibit?

Q Yes.

A Yes, it was prepared back some months ago.

THE COURT: No, no, no, please do not look at Mr. Powers. Look at me. I am talking to you.

My question is a simple one, sir. Was this document prepared in August 1972 or did I not hear you correctly?

THE WITNESS: No, that's right, August or September, whenever the original pleading was made. It was an original exhibit.

THE COURT: Was it prepared by you, sir?

THE WITNESS: No, sir.

THE COURT: Who did prepare it?

THE WITNESS: William Sosa.

Q Now, did you have a document retyped?

THE COURT: Wait just a minute.

MR. POWERS: Excuse me. I thought you were finished.

THE COURT: Do you recall what Mr. Rohn said a few hours ago about this?

MR. POWERS: That he received it a few weeks ago and reviewed it.

THE COURT: That is your version. I am glad you have that happy recollection.

Let's go back. Who is Mr. William Sosa? By the by, how do you spell that?

THE WITNESS: S-o-s-a. He was Internal Audit Manager at the time.

THE COURT: And he worked for Mr. Hatcher?

THE WITNESS: Right.

THE COURT: And what was your relationship in the hierarchy to Sosa on the one hand and Hatcher on the other?

THE WITNESS: I worked under Mr. Hatcher on basically the same level as Mr. Sosa.

THE COURT: I see. Go ahead, Mr. Powers.

BY MR. POWERS:

Q Was this retyped in preparation for this trial in the form you have Exhibit 10?

A No, not to my knowledge.

Q You just made Xeroxes of the prior exhibit; is

that right?

A Yes, sir.

Q Did you show it in this form to Mr. Rohn?

A Yes.

Q When did you show it to Mr. Rohn?

A Just in the last two weeks.

Q Did Mr. Rohn review it with you?

A Yes.

Q Did Mr. Rohn ask you questions about it?

A Yes.

Q Did Mr. Rohn interrogate you on any of the back-up data that went into that exhibit?

A Yes.

Q Did you provide some of the backup data to him?

A Yes.

Q Now, did you hear Mr. Rohn testify here in court yesterday and today on the subject matter of Exhibit 10?

A Yes.

Q Were you present in the courtroom?

A Yes.

Q Could you state for the record as to whether you have any different construction or explanation to give of Exhibit 10 than you have heard given already in the courtroom?

MR. COOPER: If your Honor pleases, I waited

until the substantive question was asked. I would like now to object to any testimony by this witness with respect to any of the documents prepared by -- not by him but by Mr. Sosa, and move to strike all of the testimony of Mr. Rohn with respect to the preparation of the exhibits and any discussions he may have had with Mr. Williams in this connection.

THE COURT: I am not going to strike his testimony, although I quite understand your making the motion. Certainly it appears that Mr. Rohn was, either unwittingly or wittingly, misled here a bit. Be that as it may, I do not say it is sufficient grounds to strike his testimony. He gave his opinion evidence and there we are.

Now, in respect to your motion not to allow Mr. Williams to testify, true, he didn't prepare this material but, as I gather, you are a Certified Public Accountant, sir?

THE WITNESS: Yes, sir, since 1959.

THE COURT: Yes. And if Mr. Powers chooses to ask him his opinions based upon these figures, why, I suppose he is entitled to do that.

MR. COOPER: Your Honor, I thought that Mr. Rohn's testimony was taken subject to connection.

THE COURT: I agree. I certainly understood and still understand that he told us that he relied on various

documents such as 10 prepared by Mr. Williams.

MR. COOPER: Correct. Now we have learned that Mr. Williams did not prepare it.

THE COURT: I grant you that and I do not know, but we have got to give Mr. Powers a chance to repair this damage. Maybe he can bring Mr. Sosa in. But in the meantime we do not have Mr. Sosa in the chair, we have Mr. Williams, and I would assume if Mr. Powers and his principal wish to elicit certain conclusions from Mr. Williams I would permit that subject, however, we are going to have to get Sosa. Without that the whole shebang goes out the window.

BY MR. POWERS:

Q Mr. Williams, are you presently in charge of the books and records of the accounting department of the Titan Group?

A Yes.

Q Are you the chief officer in charge of the books and records?

A Yes.

Q In that connection, do you have under your control all of the work papers, audit reports, of the Faggen Companies which have been transmitted to the home office?

A Yes.

Q Do you have under your possession and control all

the work papers and schedules of William Sosa?

A Yes.

Q Do you have all the work papers and schedules of Daniel Hatcher from '72?

A Yes.

Q Did you participate in conversations with Mr. Sosa back in '72 on the subject matter of this Exhibit 10?

A Yes.

Q Did you review any of the conclusions expressed in that Exhibit 10 in conversation with Mr. Sosa?

A Yes, sir.

MR. COOPER: I'm going to object to that, if your Honor pleases. We are getting double hearsay now.

THE COURT: That does not mean that the question is objectionable. It is helping establishing your point. I do not know why you are objecting. I quite agree with you, it is at least double hearsay but why you should object, I do not really follow.

Q Now, at this point, Mr. Williams, when you take us back two weeks ago, what were the circumstances under which you first met with Mr. Rohn on the subject of Exhibit 10? Where did that meeting take place?

A In the Titan office in Paramus.

Q What in connection with this Exhibit 10 did you

tell Mr. Rohn?

MR. COOPER: I object to that conversation, your Honor.

THE COURT: Yes. You are not going to repair this problem. I will spell it out for you in simple language, Mr. Powers. When Mr. Rohn took the stand, and I am not accusing him of bad faith or misstating things as he new them at all, he told us that these documents were prepared by Mr. Williams several weeks ago and that he accepted these documents as prepared and was going to give his opinion evidence, which he did.

Mr. Cooper sternly and repeatedly objected. I brushed off his objections and supported your side of the matter by saying I would take this subject to connection. You heard me, you did not disagree with me.

Now we are putting in a position where the facts turn out to be quite different. Now, we are not going to use, and -- or abuse Mr. Williams by making him into Mr. Sosa; which we know he is not. And he may have had all kinds of conversations, quite properly, with Mr. Hatcher, and Mr. Sosa and heaven knows who else. But we have got to live by some sensible rules in the courtroom.

Q Did you undertake to redo Exhibit 10 prior to this trial?

MR. COOPER: I'm going to object to that, if your Honor pleases.

THE COURT: Now, look, I do not know, Mr. Powers, whether you are trying to put your own witnesses into jeopardy here, but you are certainly skating on the dangerous edge and I cannot believe you mean that.

MR. POWERS: Sir, the purpose of that last question was to establish that there was no need to redo it because he accepted the basic principles --

THE COURT: I am sure of that, but that is not what you asked him and I have a right to object to your questions most of which are, to put it kindly, confusing, but worse than that you are not helping your own witness.

Do you disagree factually with what I just recited happened here when Mr. Rohn appeared?

MR. POWERS: Not at all.

THE COURT: Don't you see the force as a lawyer of what I am trying to convey to you and your client?

MR. POWERS: We will attempt to get Mr. Sosa in the courtroom. He doesn't work for the organization any more.

THE COURT: I invite you also, if you care to, if you want to go through this and get Mr. Williams' professional opinions of the kind you elicited from Mr. Rohn, and if you think repetition is that important, I would tolerate

it within limits, certainly, but I am not going to have Mr. Williams put in the false position of appearing here as somebody who prepared Plaintiff's 10 and these other documents because he has told us, and I believe him, that he did not.

BY MR. POWERS:

Q You prepared the other documents?

THE COURT: What other documents?

MR. POWERS: The exhibits that followed, 11, 12 and so forth. I'll show them to you. I didn't get to those yet.

THE COURT: If that is the fact, let's get to 11 and 12 or whatever you claim he did prepare.

Q I show you Exhibit 11. Did you prepare Exhibit 11?

A Yes, sir.

Q What was the basis on which you prepared that?

A The exhibit basically picks up where this exhibit leaves off and goes on through 1972.

Q Is that --

MR. COOPER: Excuse me. For my sake, since I don't have a copy marked, is that the one that is headed "Harold Faggen Associates and Affiliated Companies?"

THE WITNESS: Yes.

Q Did you prepare that from the books and records

of Titan?

A Yes.

Q Did you review the underlying schedules for each of the years involved in that exhibit?

A Yes.

Q I show you Exhibit 13, Schedule of Payments Made to Harold Faggen and Rose Faggen. Did you prepare that exhibit?

A Yes. It was prepared under my direction and I was directly involved in it, yes.

Q Did you review the books and records of the company in connection with preparing that?

A Yes, as well as discussing the matters with the company officials who had the records supporting this information.

Q What company officials were those?

A Joe Levine, Basil Castrovinci.

Q Did you discuss Exhibits 12 and 13 with Mr. Rohn?

A Yes.

Q Did Mr. Rohn ask you questions about 12 and 13?

A Yes.

Q Did he ask to see backup data on it from you?

A Yes.

Q Now, you heard Mr. Rohn's testimony on the

material contained in 10, 11, 12 and 13, did you not?

A Yes.

Q Do you have anything to add to the observations he made on the nature and content of those memoranda?

MR. COOPER: I'll object to the form of that question, your Honor, and to the substance.

THE COURT: Well, I will allow it.

Q Do you understand the question?

A Do I have anything to add?

Q Is there anything that he said on the purpose and subject matter of these various memos with which you disagree or to which you wish to supplement?

A I don't disagree with his evaluation of the subject matter and his explanation of the basic approach that was used in putting the schedules together, no.

Q Now --

THE COURT: Do you have, by the by, Exhibit 12, Mr. Powers?

MR. POWERS: Yes, it is this cash and securities transfer to and from --

THE COURT: No, I mean the actual exhibit in evidence. You and Mr. Cooper have taken these back several times and I know we don't have 12.

MR. COOPER: I don't have the one that was in

evidence, your Honor. We can mark another one.

MR. POWERS: I don't have the one that is in evidence. If you like, I will hand up mine and it can be remarked.

THE COURT: It may have been that I am the guilty party and I unwittingly misplaced it. I have all the others.

I beg your pardon. I am the guilty party. It is a short one. Here it is. You have just given me 5 and 7. Good. Thank you.

Q You prepared 12 as well, did you not, Mr. Williams?

A Yes, I prepared this in conjunction with a review of this information from Mr. Sosa's schedules and then brought it on up through the January 26, 1972, date.

Q Now, I show you the following document.

MR. POWERS: Would you mark this for identification.

xx (Plaintiff's Exhibit 15 marked for identification.)

Q I show you 15 for identification, a schedule of compensation paid. Did you prepare that exhibit?

A Yes.

Q Was that prepared from the books and records of the Faggen Companies and Titan's records?

A This information was taken primarily from the pension records maintained by the Faggen Companies.

Q Are those pension records under your supervision as chief financial officer of Titan?

A Indirectly, yes.

MR. POWERS: I would like to offer this in evidence, your Honor.

THE COURT: Why don't we use this interval to take the afternoon recess; is that all right?

(Recess)

MR. COOPER: Your Honor, I was examining a proposed exhibit at the recess and I would like to object to it.

THE COURT: All right. I take it you are objecting on grounds of relevance?

MR. COOPER: On grounds of relevance, your Honor. I also am objecting on the ground that it is supposedly -- it is certainly not an official document of any kind. I don't know where it is drawn from. It is a compilation of figures.

THE COURT: Mr. Williams told us, and it is repeated on the face of it here, he said he took this information from the pension records maintained by Miss Dogan and supervised by the trustee, Harold Faggen, or so it says here.

MR. COOPER: I don't know whether that purports to be an amount paid out in pensions or it is an amount of

salaries. I don't know what they are talking about.

THE COURT: Well, we can find out.

Q Mr. Williams, what does that schedule deal with?

A The schedule of compensation paid during the calendar years.

Q By compensation, you mean salaries, don't you?

A Yes.

MR. COOPER: Your Honor, I submit to you that the W2 forms are a much more accurate record of determination of what the compensation is. I don't know where it is drawn from. From pension plans.

THE COURT: From pension records.

MR. COOPER: Pension records.

THE COURT: That is what it says here. I do not really know how to answer that. Maybe you are right. But in any event, what puzzles me is, what is the direct relevance of this, Mr. Powers?

MR. POWERS: One of the claims here is that the adjustments were a cutback of Mr. Faggen's salary and a cutback in Miss Dogan's salary, and this shows what the actual salary was that was taken from Mr. Faggen's supervision from that point forward.

It further is a supporting document to the total cash consideration received by Mr. Faggen over the period

with relationship to the -- to be balanced by the cash consideration to be taken out by Titan in the Faggen Companies.

THE COURT: As usual, aren't you a little bit overlooking the fact that there is evidence produced by your own witnesses that he did work at Titan? You are not taking the position that he is not entitled to salary, are you?

MR. POWERS: No, I am trying to add up the magnitudes of both the salaries he took for himself and that which was assigned to Miss Dogan.

THE COURT: Well, I will overrule the objection. I would not consider it of first-line importance. I have to agree with you, it may well be relevant.

Q Now, Mr. Williams --

xx (Plaintiff's Exhibit 15 received in evidence.)

Q Mr. Williams, when you were preparing Exhibits 11, 12 and 13, what data did you examine?

A I examined work papers that had been assembled by Titan employees in April of '72, which was a great volume of detail that involved billing, accounts receivable -- not accounts receivable, cash receipts from billed items, trial balances, the statements that had been submitted to the Titan corporate office, workups made by three or four different Titan staff people related to the conversion from the cash to the accrual basis of accounting.

Q Did you look at any material in connection with reviewing Exhibit 10?

A Yes.

Q What material did you look at in connection with Exhibit 10?

A All of those same materials.

Q Was there any reason for not redoing the document which we have called Exhibit 10?

A No.

MR. COOPER: Objected to, if your Honor please.

THE COURT: I quite agree. I do not see any point in that. Let's get on to something else.

Q When you had your meeting with Mr. Rohn, to go over the materials, prior to this trial, what documents did you give to Mr. Rohn?

A Exhibit 10, 11, 12, 13, all of the exhibits that you have shown me so far.

Q Did you have a conversation on the subject of those exhibits?

A Yes.

Q Did Mr. Rohn ask to see any backup material on any of them?

A Yes. He reviewed Mr. Sosa's work papers related to the conversion from the cash to the accrual method of

accounting, the basic approach that Mr. Sosa had used for that conversion, the materials related to where the basic numbers came from on this schedule, the accrued vacation schedules, the source of Mr. Sosa's adjustments related to accrued vacations, all of the basic items on the -- all of the exhibits that he and I reviewed.

Q And you did the same review yourself?

A Yes.

MR. POWERS: Nothing further.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Williams, if I understand your testimony now, you did not go back to the official books of entry or the official records, you looked at the work papers that Mr. Sosa had prepared; is that correct?

A Mr. Sosa as well as two internal auditors by the name of Craig Thursby and Mike Niemeyer.

Q What I'm getting at is, you were looking at the work papers of others, not the official books?

A Right.

Q And the source material from which they drew their material and the basis upon which their material -- from which that material was drawn was based upon their judgment of what should or should not have been included?

A Taken from the books of Faggen Companies.

Q Whatever was included from the books or not taken from the books, you had no other knowledge except what you saw on the work paper; isn't that so?

A Right.

Q So that all that you and Mr. Rohn reviewed were not official source records, the raw data, but only the work product of others; isn't that so?

A What we normally --

Q Just answer my question. You didn't go to the official data, others did.

A Right.

Q And the others were Mr. Thursby, Mr. Sosa and who else?

A Mr. Niemeyer.

Q And Mr. Sosa had previously occupied a position similar to your own?

A Not similar to my own. On the same level on the staff of Titan.

Q I see.

MR. COOPER: If your Honor please, at this time then I move to strike on the ground that none of the records reviewed by either Mr. Williams or Mr. Rohn were the official books and records of Titan Company on which summaries were

prepared. They were preparing summaries from summaries of other people.

THE COURT: Arguably that might have something to do with the weight, but I do not think it is sufficient to require that its views be stricken from the record.

Q Mr. Williams, did you know Mr. Brandenberg?

A Yes, I have met Mr. Brandenberg.

Q Okay. During the luncheon recess this piece of paper was shown to Mr. Levine and I don't know whether you were present when he saw it.

A No.

Q But I ask you if you recognize Mr. Brandenberg's writing.

A No, I don't.

Q All right.

MR. COOPER: Will counsel concede that Mr. Levine signed that paper?

MR. POWERS: If I could have an off the record a minute to turn to Mr. Levine and find out. I don't know.

So stipulated, your Honor.

MR. COOPER: Now I offer that in evidence, if your Honor please.

MR. POWERS: No objection.

MR. COOPER: That is now Exhibit K in evidence.

MR. POWERS: I think that is my copy you are putting in.

xx (Defendant's Exhibit K received in evidence.)

Q Now then, Mr. Williams, would you read it, please? I think the typed copy will be easier. It is just a typing of what is written.

Having read that, Mr. Williams, would you agree with what Mr. Brandenberg was saying in April of '72 when Mr. Hatcher was trying to construct an accrual basis of accounting on the books and records of the Faggen Companies?

A Insofar as full accrual basis financial statements, I would have to agree. If full were taken out of his memo, then I would not agree. Because his point, as I see it, is that he's indicating that under the theory of accounting of comparing revenue and cost unless you could come up with time and expense records related to every client being services by the Faggen Companies, you could not on a hundred percent basis put together a relative income and related expense statement.

Q Well, it was also -- he was also dealing, was he not, with the fact that in the fees and retainers item there was no amount of time and expense attributable to the fees and retainers of particular clients, isn't that so?

A What he's saying is it appeared that no records

existed which would tie it down to specific clients.

Q So that without the records, there would be no way to accrue the amount of fees and retainers for any given year, would there?

A On a full and complete hundred percent accurate basis?

Q Well, don't you assume, Mr. -- do I understand you correctly, Mr. Williams, to say that the documents which you have submitted here are something less than a conversion to an accrual basis of accounting?

A They are conversion to an accrual basis of accounting based on the records that exist in the company. Anytime you make a conversion from a cash basis accounting to an accrual basis of accounting, and you don't have records related to time and expense directly tied to the revenue book, you could not on a hundred percent accurate basis or a full basis convert to an accrual method of accounting. That doesn't mean that the conversion would be off to any material extent because, if you use the proper technique in making the converstion, over a period of years you are going to pick up all of the revenue and all of the expenses that related to that revenue. And this is the only point that he's attempting to make in this memo.

Q Whether or not it is the only point or not, Mr.

Williams, my question is, that is addressed to you, is that when you prepared the summaries you didn't state that these summaries were something that was prepared without books and records to back up the basis of your conclusions, did you?

A No, it said that they were put together on an accrual basis of accounting based on the records that were available.

Q But you don't point out to the Court that there were no records available for the period beginning period behind '65?

A That's in Mr. Hatcher's affidavit. Reference to the records that were reviewed and the fact that a full and complete conversion from a cash to an accrual basis of accounting could not be made. But the point is that looking at the four years --

Q Mr. Williams, let me interrupt you for one second because I don't think you are responding to my question. My question is that in the preparation of the exhibits which you have submitted here, your preparation of exhibit, I think it was, 10, which was the material that had been prepared by Mr. Sosa, right?

A Right.

Q That purports to show a converstion to an accrual basis from a cash basis, doesn't it?

A Right.

Q But it doesn't state on the document itself that there was an inability to get the records in order to make the conversion, does it?

A On the schedule itself?

Q Yes.

A No.

Q All right.

You also submitted an exhibit -- I believe it is Exhibit 11 -- in which you show cash of $933,000. Now, that is showing cash from October 1, '68, through January 26, '73, right?

A Right.

Q That $933,000, does that take into account the fact that at the time that Mr. Faggen delivered the securities to Titan he delivered the amount which was shown on Exhibit J, which has been identified as having a market value as of December 31, '68, of $1,386,128; that doesn't show on that exhibit as a million 386, does it?

A No. Would you like me to clarify it?

Q I will let you go back in a minute. First I want to get this nailed down.

$175,000 in negotiable securities was also turned over on that date, wasn't it?

A That would have to come into this number here.

Q You are saying the 933,000?

A Includes the treasury bonds, right.

Q Mr. Williams, did you check over the exhibits which were marked Exhibit H to Mr. Faggen's affidavit, pages 101 through 110; did you check over the receipted securities and treasury notes that were turned over to Titan?

A You will have to show me the exhibits. I don't know which ones you are referring to.

Did I check over this exhibit?

Q Well, either the exhibit or a comparable document in Titan's file showing the receipts by Mr. Russo of the securities as well as the treasury notes.

A Yes.

Q All right. Now then --

MR. POWERS: Objection, your Honor, I don't think that exhibit shows treasury notes being received. There's another exhibit and Mr. Russo's testimony that is --

THE COURT: Since I am not privy to what he is reading, I cannot answer you on that.

MR. COOPER: Your Honor, it is pages 101 through 109 of the appendix, and on page 101 there shows a delivery of $50,000 of treasury notes. On page 106 -- let me do it with you, Mr. Witness, so that you can follow it.

Q Mr. Powers says that it doesn't show it and I would like you to testify to it.

A Well, I have not verified this schedule to the schedule that I have seen that indicates that the securities that were transferred to Titan. There is a schedule that has been admitted that ties into the million nineteen thousand figure.

Q Well, right now we are only addressing ourselves to whether or not Titan received at the time from Mr. Russo picking it up, if you just follow with me, I think you can identify this, because Mr. Russo has acknowledged this was his signature. Here we have treasury notes, correct, $50,000, right? You have got to answer for the record.

A Yes, I read treasury notes.

MR. POWERS: Your Honor, I object to that. That exhibit is in evidence, it speaks for itself. What it shows, it shows. And the reason for my objection is there's another exhibit in evidence that contradicts it which was testified to by Mr. Russo that the treasury notes were not transferred. And your Honor has to decide which is the fact, but there's no point in questioning this witness on what that page says.

THE COURT: I certainly tend to agree with that. I do not see why we have to go into this. The witness does not know anything about this except what he has heard. He

was not around at the time.

MR. POWERS: Sir, the contradictory document which says the treasury notes were not transferred --

THE COURT: I am aware of that. I have already agreed with you. Why do you bicker with me? I am trying to tell Mr. Cooper that I am sustaining your position. I see no point in all of this, even from Mr. Cooper's position.

MR. COOPER: The only point is in explaining Exhibit 11, which is the summary prepared by this witness; he says the $933,000 includes an item of $175,000 in treasury notes. And I was trying to demonstrate through this witness that, in addition to the treasury notes, there was additional payments made.

THE COURT: Well, if he knows, fine. But I see no point, and here I agree with Mr. Powers, in getting him to read a document which he did not prepare and really can say no more or less than he reads.

Incidentally, there is a further problem, in reading the document; I find it hard to understand, even with my bifocals. So there is a better way of doing whatever you want to do on this, and not with this witness.

MR. COOPER: All right.

Q Mr. Williams, I show you this document which I think is 12, which is entitled, "Harold Faggen Associates

and Affiliated Companies." You prepared that document?

A Yes.

Q You see a column which you have headed, "Represented Net Income." Do you know that there are contract documents in evidence in this case in which Mr. Faggen made a specific representation as to what his net income was?

A Yes.

Q Are you aware of that?

A Yes.

Q That was the amount shown on the tax returns, correct?

A Yes.

Q And your audit verified the fact that the amounts shown on the tax returns were accurate?

A That the amounts shown on the tax returns agreed to the schedules that were assembled?

Q I'm talking about the representation in the contract was that the net income was as shown on the tax returns and you subsequently made an audit of the Faggen books and the Faggen books showed that almost dollar for dollar the amount shown on the tax returns were accurate.

A They agreed with the amounts of pretax income reflected from the Faggen books, yes.

Q Okay. Now, then, when we are talking about net

income, it is net income pretax; is that right?

A Right.

Q Okay. Now then, when you put down as a heading of a column, "Represented net income," where did you get the designation "Represented net income" from?

A It is indicated on the schedule that this information was taken from the Dan Hatcher affidavit.

Q I see. In other words, you didn't verify this column head?

A Yes, I did verify it. Insofar as the captions, they were picked up from previous information that had been submitted.

Q Did you check to see whether, in fact, Mr. Faggen had represented in his contracts the net income?

A In the contracts?

Q Yes.

A No. The contract as I understand it referred to tax income.

Q Yes, represented net income pretax, right?

MR. POWERS: Objection, your Honor, he's trying to argue his case with this witness.

MR. COOPER: No, I'm not at all, your Honor.

MR. POWERS: I think this has been asked and answered three ways. I will stipulate that the taxable income

shown on the tax returns is the same taxable income which is the beginning point on Exhibit 10 for the four years.

THE COURT: All right. Let's go ahead. Anything else you want to ask of Mr. Williams?

Q Mr. Williams, the amounts of payments that were made for salaries to Mr. Faggen during the years in question from 1969 through 1973, those payments were made out of the Faggen division, were they not?

A Yes.

Q They were not taken from Titan's funds, they were taken from Faggen funds, right?

A Faggen division funds were Titan funds -- were and are. They are one and the same.

Q Is Faggen a separate corporation?

A Yes, but it is a wholly-owned subsidiary.

Q I understand that.

A Accordingly, there's no difference in the funds or the control of the funds.

Q The profits that were generated out of Faggen, were the profits generated out of the Faggen division; isn't that so?

A Right. And as such were part of the Titan overall earnings.

Q Yes. And the amounts that were paid to Mr.

Faggen were paid to Mr. Faggen out of that division and reduced the amount of profit from that division, didn't it?

A Certainly.

Q Now, with respect to Rose Dogan, did you determine when she married Mr. Faggen?

A No, it didn't enter into my thinking insofar as the schedules.

Q In other words, you were willing to prepare a schedule charging Mr. Faggen with Rose Dogan's salaries for two years in which they were not even married?

A That's not what that schedule purports to do. It doesn't purport to charge him for anything. It -- there are indications in the file from his agreeing to indemnify the company or any vacation accrual applicable to Miss Dogan, and--

Q Then tell me this --

MR. POWERS: Could I object and let the witness please finish his answer, sir?

THE COURT: Yes.

MR. COOPER: I thought he had.

Q Did you finish?

A No, I said "and."

Q Go ahead.

A In addition, there's a reference in Mr. Faggen's affidavit to the effect that Miss Dogan's compensation is a

part or an integral part of the compensation package, words to that effect.

Q That's in Mr. Faggen's affidavit?

A Right.

Q Or was that in Mr. Hatcher's affidavit?

A No, it was in Mr. Faggen's affidavit, as I remember it.

Q Well, I'll get to that in a second.

I show you this, Mr. Williams, and ask you in preparing this document, which I guess is Exhibit 12, you say "payments by TGI to the Faggen's or for their account," and then you have got salary, Harold Faggen and Rose Dogan. Did anyone instruct you to include Miss Dogan or Mrs. Faggen now as a charge to Mr. Faggen?

A No.

Q You did it on your own?

A Yes, because I understood that her compensation was part of the overall compensation package. And that he was indemnifying the company from any vacation accrual, and that accordingly her compensation would be included in the total being assembled for this schedule.

Q You mean the fact that he indemnified in December of '68 against Titan having to pay for her accrued vacation pay, you took that to mean that he was going to assume the

burden of all salary payments made to her in the years thereafter?

A No, that's not it.

Q You said it was part of the compensation package.

A Right. I said and the other references to her compensation being a part of the overall compensation package contemplated for the future led me to believe that it would be proper to include it.

Q Do you know that the contract documents also included compensation to other people, on the payroll of Titan, than Harold Faggen at the time of this acquisition? There are about eight or nine. You didn't include that in this, did you?

A No, because there was no specific reference to them in any other matter. Such as on the vacation matter.

Q It was only because of the vacation matter, then, that you included her?

A No, and in the language in the affidavit.

MR. COOPER: No further questions.

THE COURT: Thank you, Mr. Williams. You may step down.

MR. POWERS: One question, Mr. Williams.

REDIRECT EXAMINATION
BY MR. POWERS:

Q You just made a reference to Harold Faggen's

affidavit on Mrs. Faggen being included in the compensation package. Were you referring to paragraph 39 of the reply affidavit of Harold Faggen when you made that statement? Is that what you are referring to right here?

MR. COOPER: If your Honor pleases, I would like to note for the record that Mr. Powers has directed the witness' attention to a specific paragraph and the witness is now reading through an entire affidavit.

THE COURT: I cannot be sure that is so. But in any event --

Q What paragraph are you pointing to?

A Paragraph 30.

Q Of the reply affidavit of Harold Faggen? Would you read it into the record, please.

THE COURT: No, no, we do not, Mr. Powers. That has been repeated so often I am aware of what he is reading. The exhibit is in evidence and we won't have any rereadings from you or any -- poor Mr. Williams, let's not bother him.

MR. POWERS: Can I help the Court by saying it's 3708?

THE COURT: No, I am capable of reading and I would thank you not to put any words or ideas in my mouth or mind either. Thank you, Mr. Williams, you may step down.

MR. POWERS: Your Honor, I was just going to give

you the page number.

THE COURT: I understand it. I can find it. I have gone through this thing ad nauseum. Thank you just the same. Would you please come in with Mr. Cooper briefly.

MR. POWERS: Surely.

THE COURT: We will suspend until 10 o'clock tomorrow morning.

(Witness excused.)

(An adjournment was taken to March 7, 1974 at 10 o'clock, a.m.)

dhrm 150 Williams-redirect

TITAN GROUP, INC.
vs.
HAROLD FAGGEN,
Defendant

72 Civ. 1797

Before: HON. HAROLD R. TYLER, JR., D.J.

March 7, 1974
10 o'clock, a.m.

(Case resumed.)

MR. POWERS: May I recall Mr. Herbert Williams to the stand, please.

W I L E Y H E R B E R T W I L L I A M S , resumed.

REDIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Williams, I show you Exhibit 8 in evidence, a document entitled "Income Projections."

Have you seen that document before?

A Yes, I have.

Q I now show you a Xerox of Exhibit [illegible] with a typed addendum to it, which we will mark as Exhibit 8A for identification on the record. I will put a tag on it in a minute, Mr. Reporter.

May I ask you, Mr. Williams, if you prepared that addendum, which is the substance of Exhibit 8A?

A Yes, I did.

Q On what basis did you prepare that addendum?

A It is taken --

MR. COOPER: Before we do that, I will object to that, your Honor, until we have the opportunity to see it.

MR. POWERS: My reason for asking the question, it is not a self-explanatory document. Before I offer it in evidence, I wanted him to tell the Court what it was.

THE COURT: I certainly think that is proper so long as it is just a generic description.

Q Yes, just give a generic description of what the addendum is.

A It is a typed version of the numbers as they appeared on the handwritten exhibit, and then inserted are actual numbers that relate to volume and to pretax income.

Q For the periods shown?

A Right.

MR. POWERS: I would like to offer this, if I may, your Honor.

xx (Plaintiff's Exhibit 8A marked for identification.)

MR. COOPER: Your Honor, I'm going to object to the introduction of this exhibit on the ground that, first of all, it is irrelevant, it is not part of the issues in this case.

Secondly, it is a summary based upon -- I assume it is a summary -- based upon something which was not a

document on which the plaintiff is alleged to have relied within the pleadings of this case.

THE COURT: May I see whatever this document is?

As I understand this, Mr. Williams, this is just a rehash of Plaintiff's Exhibit 8. In other words, looking at this, all this seems to be is an accountant's rewrite or refiguring, if you will, in lay terms, of what we know as Plaintiff's 8; that is, this attached --

THE WITNESS: Right. With the actual numbers superimposed on the schedule.

THE COURT: I take it the basic underpinning of this is, this is all on an accrual basis, right?

THE WITNESS: Yes, sir.

THE COURT: I must say, Mr. Powers, it seems to me that all you are endeavoring to prove here is what we know already, that business did not go very well for the Titan Group including all of its divisions, beginning in or about 1971 in particular. How you think you are going to blame all this on Harold Faggen, I do not understand.

MR. POWERS: Well, your Honor, I propose to show--

THE COURT: I have already heard from some of the people who succeeded in helping mucking this thing up, and then there was the market which hurt them. Titan has had a very bad time, we all know that, but that is not all

Faggen's fault even from your point of view. It cannot be. He had nothing to do with all their divisions.

MR. POWERS: I propose to show with additional witnesses that the main -- through additional witnesses that one of the major reasons for the drop in gross revenues and, of course, drop in income, is a result of the loss of the clients of Faggen Companies; some of which were brewing before the acquisition and were undisclosed.

THE COURT: What I cannot understand is, you have got to understand that Rule 10(b)(5) is not designed as an insurance policy for the vicissitudes of corporate life after an acquisition. I do not get this.

MR. POWERS: I couldn't agree with that statement more, your Honor.

THE COURT: We certainly spend more time on that kind of a theory than anything else in this case.

MR. POWERS: Sir, the theory is that this company was not the company it was represented to be when it was sold.

THE COURT: I understand that, but it is awfully easy five years after the event to reconstruct figures on an entirely different accounting basis and based on facts and circumstances which emerged in the years after the acquisition, and to come up with some round numbers in the record that look absolutely frightening and yet which are monstrously

unfair from anybody's point of view. I do not mean to blame Mr. Williams. Obviously he did what he was asked to do, but this strikes me as a contrivance, after the fact contrivance.

All of these computations have been prepared incident to this case. I just do not understand you. It seems to me we are trying everything under the sun that happened later and that is really an effort to blame the Faggen Companies for all of the problems which occurred to many, many other aspects of Titan, which, to put it kindly, has had a succession of chief executive officers and other people who -- why is it all of a sudden they are virtuous and Harold Faggen is such a rascal? I do not get it. I will tell you what we will do: I am not going to take this because there is another reason. All it seems to me we ought to do is --

MR. POWERS: Could I say one thing more, your Honor? I am putting particular stress on the gross revenues column in the exhibit, because the drop-off in gross revenues which ultimately controls income comes from the number of clients you have and what they are spending with you and that is one of the next elements I plan to prove today.

THE COURT: Look, wouldn't you agree that under the law that if I acquired a company from you and you came in

and operated that as a division, and then business fell off over the years, that that is no basis, standing by itself, to prove fraud in the inducement or, as we lovingly have to say it around here, a violation of Rule 10(b)(5)?

MR. POWERS: I agree with you completely.

THE COURT: That is the danger here. We are just cluttering up the record with all kinds of red herring.

MR. POWERS: What I'm attempting to show is the loss of revenues from loss of clients that you see there in '69, '70 and '71 was already in process in '67 and '68. I'm going to do that with oral testimony and other material --

THE COURT: First of all, '69 was not bad at all. Neither was 1970; neither was 1971. The trouble arose in 1972 and 1973.

MR. POWERS: Well, your Honor --

THE COURT: At that time Faggen and these other people, Frankel, were all at each other's throats. Obviously things for that reason alone would not be going well.

MR. POWERS: Your Honor, I intend to bring up --

THE COURT: The rest of the operations by Titan were flat on their backs.

MR. POWERS: Sir, I'm not trying to bicker, but I intend to bring up with other witnesses that the gross revenues that you see there for '69, '70 and '71 actually

represent two kinds of revenues from a sick computer business that never went anywhere and from a shrinking actuarial basis which was bought, but I have to use oral testimony from people in the company presently to make those divisions and this is really a foundation document to move on into that explanation.

THE COURT: I was just going to say, I am going to give you latitude if somebody can come in here and testify to something on the point, and I do not quarrel with Mr. Williams on this at all. It is his competence to do this kind of thing.

All I am saying is we are trying so many issues in this case which in my judgment are nothing other than a desire of the litigants to bury each other with mud. That is all.

And to blame organizations and personages for things that probably were just as much, if not more so, the fault of others in other divisions and other operations. But I will not accept this document now subject to your right, however, if you are going to offer all this other evidence -- we have heard from everybody under the sun now. I cannot imagine anybody else, but if you claim there is somebody else who will pin this down, why, then, I will go along with you.

Do you want to examine him on any feature of this

document? I am not going to receive it, Mr. Cooper, but it may be received later if he can tie it in, see.

MR. COOPER: I have no basis for examination.

THE COURT: Thank you, Mr. Williams.

(Witness excused.)

MR. POWERS: The next witness, sir, is Mr. William Sosa.

W I L L I A M S O S A , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Sosa, were you employed by Titan in 1972?

A Yes, I was.

Q What was your position?

A I was corporate auditor and assistant treasurer.

Q When did you go to work for Titan?

A In the summer of -- July 1972.

Q What was your background before you went to work for Titan?

A Well, I am a Certified Public Accountant in New York, I was on the staff of Haskins & Sells, a CPA firm for about eight years, and I've been a key financial employee and corporate officer in about three or four corporations including Titan Group.

Q I show you a document which, for purposes of this trial, we have called Exhibit 10, although at the foot of it it says Exhibit E because it is a Xerox, but this is Exhibit 10. Did you prepare that document?

A Yes, I did.

Q Can you tell the Court when you prepared that document?

A I prepared this document -- the work I began in the late summer of '72 and continued on through the early fall of the same year.

Q What were the materials you used in connection with preparing that document?

A I used the books and records of the Faggen organization.

Q Did you visit the Faggen organization in connection with that document?

A Yes, I did.

Q When did you visit them?

A I believe this was in August of '72.

Q How much time did you spend there?

A Approximately three weeks.

Q What did you examine there?

A I examined the corporate tax returns filed with the federal, state and city as well as all the accounts and

relevant books and records.

Q Did you look in ledgers?

A Yes, I did.

Q Did you have conversations with a financial employee at the Faggen Companies?

A Yes, I did.

Q Who was that?

A That's Mr. Joseph Levine.

Q Did you review materials prepared by others in Titan before you did your work?

A Yes, I did.

Q Who were those people?

A I think they were Mr. Niemeyer and Thursby who had performed an audit a little earlier the same year.

Q Did you accept Thursby's work?

MR. COOPER: I object to the form of the question.

THE COURT: Yes.

MR. POWERS: I will rephrase it.

Q Did you do anything with respect to Thursby's work?

A Nothing except use some of the basic rearrangement of the material. The basic material.

Q But you did a complete review and audit of your own?

A Yes, I did.

Q And you didn't rely on Thursby's work?

A No.

MR. COOPER: I object to that, if your Honor please.

THE COURT: I do not quite understand this. You will have to rephrase that. From your own point of view I do not think that is proper.

Q Did you prepare this document based upon official inspection of ledgers and other materials at the Faggen Companies that you did?

A Yes.

Q In connection with preparing that document, did you have discussions with other financial people in Titan on it?

A Yes, I did.

Q Who did you discuss it with?

A With Daniel Hatcher and Herbert Williams.

Q Did you have several discussions with both of them on that subject?

A Yes. Quite a number of discussions.

MR. POWERS: I have nothing further, Mr. Sosa.

THE COURT: This is Plaintiff's 10, correct?

MR. POWERS: Yes, sir.

THE COURT: All right.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Sosa, I believe you said that you began to do this work in August?

A That's right.

Q At the time had anyone else that you know of --

MR. COOPER: Withdrawn.

Q Mr. Hatcher was your immediate superior?

A That's right.

Q When Mr. Hatcher -- withdrawn.

Did Mr. Hatcher instruct you as to what he wanted you to do?

A Yes.

Q In his instructions, did he tell you that he wanted you to reconstruct a computation demonstrating the earnings of the Faggen Companies on an accrual basis?

A Basically, yes.

Q That would take you back behind 1966.

A Right. '65.

Q Isn't it a fact, Mr. Sosa, that it was impossible to reconstruct on an accrual basis the earnings, the fees and retainers of the Faggen Companies for the periods prior to that time since they had always been on a cash basis?

A No, it was not, because what I did was tried to relate the billings that were made each year rather than the cash collections.

For example, in one year they may have collected two years' billings from a client and shown two years as income receipts. But what I did was merely show one year, because that was the income that related to that particular year.

Q Let me show you a document which is in evidence. This is Mr. Brandenberg's memorandum to Mr. Hatcher in April of 1972. I would like you to read it, please.

Have you read it?

A Yes, I have.

Q Did you have that before you at the time that you did your work?

A I have never seen this document until now.

Q Did you know who Mr. Brandenberg was?

A Yes, he's the partner at Ernst & Ernst -- rather at Touche Ross in Louisville.

MR. POWERS: Would you speak up, Mr. Sosa?

A Yes. Arthur Brandenberg is a partner in the accounting firm of Touche Ross in Louisville.

Q You will observe that Mr. Brandenberg had advised Mr. Hatcher that it wouldn't be possible to make an accrual

basis computation beginning in the periods in which there had been no records; isn't that so?

A Yes, that's what he says.

Q Nevertheless, you say you were able to do it?

A Yes, I was.

Q And you didn't have in front of you any time sheets or ledger sheets showing the work performed by particular actuaries for particular clients at the time that you prepared your sheet, did you?

A I don't recall. You are asking me about a detail but I don't recall.

Q In order to be able to calculate on an accrual basis the fees and retainers, you would have to know, as Mr. Brandenberg points out in his memorandum, what the time sheets were, what the work performed on behalf of particular clients were in the particular years in order to prove that, wouldn't you?

A I don't think so because, as I explained earlier, my basis was the billings each year.

Q But the billings don't show you on accrual basis of accounting, that's a cash basis of accounting, isn't it?

A No, it isn't because the billings may be made in one year and collected the following year, and since Faggen was on a cash basis they were merely reflecting what they

were collecting rather than what they were billing.

Q Without knowing the time that was put in on any particular year, you wouldn't be able to know, would you, even if it may have been billed in one year and collected in the next?

A I think you are referring to work in process, and that wasn't my concern. I was more concerned with the billing itself.

Q Mr. Sosa, in preparing your Exhibit 10, you were instructed what items to consider, were you not?

A Again, my instructions were more of a general nature.

Q Well, referring to the exhibit, Mr. Sosa, you eliminated from the income of these companies the pension overfunding, didn't you, as an adjustment to earnings?

A I don't understand what you mean by eliminating. I don't see any item here referring to a pension.

Q All right. What I'm getting at --

MR. COOPER: Do you have Exhibit 1, Mr. Powers?

Q Mr. Sosa, were you shown a document like this in anticipation of the preparation of that exhibit, which is now marked Plaintiff's Exhibit 1 in this case?

A Yes, I had seen that letter.

Q Is that the basis on which you calculated what

items would be included and what items would not be included in making this computation?

A No, it isn't.

Q All right. I see, Mr. Sosa, that on this Exhibit 10 you start out with a heading, "Net income pretax, adjusted to basis which prevail after acquisition."

A I'm sorry, whatare you reading from? Oh, I see. All right.

Q First of all, was that a title which you put on?

A Yes.

Q You used the past tense of "prevailed" after acquisition, but you deal with the period from '65 to '68.

A That's right.

Q Right?

A Right.

Q Do you know that Mr. Faggen had prepared a document which spoke of net income pretax adjusted to the basis which would prevail after acquisition?

A I don't recall. I'd have to see the document to refresh my memory.

Q Or which will prevail rather than would prevail.

A Yes, I had seen that.

Q All right.

Mr. Sosa, you made assumptions as to what

adjustments to include into this exhibit, didn't you?

A Yes, I did.

Q Who instructed you which assumptions to make?

A These assumptions were based on what I conceived to be generally accepted accounting principles in part.

Q Did anyone tell you what assumptions to make?

A Well, in certain cases, yes. For example, Harold Faggen's $50,000 limitation was a factor that I had to be instructed on.

Q Who instructed you?

A I believe Mr. Hatcher or it could have been from my reading of documents. I don't just recall what the source was.

Q Did you read the contract documents?

A I went through them, yes.

Q Did you take into account the adjustment to Rose Dogan's salary, a reduction in her salary?

A No.

Q No one told you to do that?

A No.

Q And you didn't check to see what she had earned in the period '65 to '68 and what by contract she would have earned after that period?

A Yes, I looked at her salary.

Q Do you know that her salary was reduced for the year '68 by more than $10,000?

A I don't recall specifically, but --

Q Did anyone instruct you not to include that deduction into this computation?

A As I recall, it was not a factor in this computation.

Q When you say not a factor, who made the decision whether it was or it was not?

A Well, this was reviewed with all the officers in the company.

Q Who were among the officers that reviewed it?

A Well, Mr. Hatcher and Mr. Williams.

Q In making the determination, you made among yourselves the determination not to include it; is that what you are saying?

A We did make no adjustment for her salary, no.

Q Did you discuss it among yourselves as to whether you should or should not?

A Yes.

Q And then you decided you should not?

A Right.

Q I see.

If, however, Mr. Sosa, if at the time that the

parties were negotiating this acquisition back in 1968 -- by the way, you were not there then, were you?

A No.

Q You had nothing to do with the manner in which the negotiations were conducted or what was agreed upon between the negotiating people; isn't that so?

A No, I didn't.

Q For example, if there was a discussion between Mr. Faggen and Mr. Kaufman, who negotiated the transaction, that Rose Dogan's salary was an adjustment to what the income was as reported on the tax returns, if you had been told that by anyone in Titan, you would have fed that into this computation, wouldn't you?

A Well, I wouldn't have taken the -- if there had been some basis for -- of agreement, I would have put it in, but I saw nothing that indicated that such an agreement had been made.

Q Did you know by looking at the contract documents that Rose Dogan's salary was, in fact, reduced since the acquisition took place? That would have shown you that, wouldn't it?

A Yes.

Q And you would have had to have taken it into account then, wouldn't you?

A I don't see why.

Q Well, if you are told by the people who negotiate the deal, look, when you are adjusting the income, take into account we are going to reduce Rose Dogan's salary after we buy these salaries but assume that her salary had been reduced back in '65. This was a -- let's withdraw the question for a minute.

Did you understand at the time, Mr. Sosa, that you were doing your work, that the parties had been talking about what the picture of the Faggen Companies would have looked like if they had been owned by Titan beginning in 1965; did you understand that?

A Yes.

Q So that what the parties were doing between themselves as to what items would be included and what items would not have been included in the earnings of the Faggen Companies if they had been publicly held would have been a matter as between the negotiators as to what items to consider, wouldn't it?

A That's right.

Q Okay. So that if they did consider that Rose Dogan's salary would have been reduced if the Faggen Companies had earned this, that would have been a factor which you would have had to have factored into your computation,

wouldn't you?

A Yes, but I don't know that that was the case. I don't recall seeing that.

Q You made assumptions, in everything that you did here, didn't you?

A Yes, I made certain assumptions.

Q For example, you made an assumption that Harold Faggen's earnings were reduced to $50,000 by contract; therefore, that would have been an adjustment carried back, didn't you?

A That's right.

Q Okay. And if, in fact, Rose Dogan's salary was also reduced by contract, you would also have had to have carried that back if the parties had discussed it, wouldn't you?

A Well, you are jogging my memory now, and Rose Dogan was an employee of the company, so what her salary was was a matter of agreement between her and her employer.

Q Well, Mr. Sosa, this is not by way of a trap. It is already in the case. There is a contract document which does point out what Rose Dogan's salaries would be after acquisition, and those salaries were reduced by more than $10,000 for the year 1968 alone. Now, with that in mind, wouldn't you say that if someone had brought this to your

attention that this was an item after adjustment that you would have considered it in the preparation of this exhibit? Just as you did with Mr. Faggen's salary?

A The Faggen salary limitation to $50,000 was an agreed-upon thing. As I said, I don't recall any such agreement regarding Rose Dogan herself. The fact that her salary dropped afterward was not an appreciable matter as far as the preparation of this document is concerned.

Q Well, better than $10,000 is not an appreciable matter? What's your answer?

A I didn't consider it a factor, no.

Q Did anyone draw that to your attention?

A We talked about it, yes.

Q You made the determination to not consider it; is that what you are saying?

A Yes.

Q I see. You made no effort, did you, to find out from those who negotiated this transaction as to whether or not that was a factor between the parties at the time they negotiated?

A The information was not as clear cut as all that.

Q Information from whom?

A From the documents, the available documents.

Q You mean the contract documents?

A Yes. The only thing we really had to go on was one of those sheets you showed me, where these adjustments were made to figures.

Q But you said before that you looked at the contracts themselves.

A Yes, I did.

Q By looking at the payroll records of these companies for the earlier years, by simply looking at the documents, you would have been able to tell what Rose Dogan had earned in the prior years and what she was going to earn after this, couldn't you?

A Yes, I could.

Q And you didn't do it?

A I didn't do what?

Q You didn't consider that it was a factor?

A No.

Q And you didn't check with the people who negotiated to find out if it was a factor?

A Yes, I said we had discussed it.

Q No, I'm talking about the person who negotiated the deal, Mr. Kaufman.

A No, I have never met or talked with Mr. Kaufman.

Q In preparing this document, Mr. Sosa, wouldn't it have been important to find out what the parties had agreed

upon when they negotiated this transaction to see what the adjustments were between themselves?

A As I said, the only thing I had to go on was that document, that handwritten document you showed me, and it seemed to me at the time that Rose Dogan, being an employee, the fact that her salary was reduced after, had nothing to do with this.

Q But what you are saying then is it was a decision that you made but which you didn't verify with anybody as to whether that decision was correct or incorrect?

A Well, I made the decision and it was talked among us and decided that it was not a factor because it was a salary, something that could be arbitrarily adjusted.

Q Just like Mr. Faggen's was?

A Well, Mr. Faggen's was by agreement.

Q So was Miss Dogan's.

MR. POWERS: Objection. Is he testifying now, your Honor?

MR. COOPER: No,. I am pointing it out to the witness.

Q So was Miss Dogan's.

A Again, you are jogging my memory, and trying to recall my reasoning. At the time, it seemed to me that if a president of a company is doing an efficient job, there

really is no reason to cut his or her salary back.

Q That's true. But her salary was cut.

MR. POWERS: I object to that, your Honor. He states this is a fact. It is not in evidence and it has not been established here.

THE COURT: I do not think that I will take it, that necessarily it is.

I might point out, Mr. Cooper, if that was intended as a question, it surely lost me.

MR. COOPER: Okay. I withdraw it, Judge.

Will counsel concede in the testimony elicited yesterday we demonstrated that, from the contract documents, that Rose Dogan's salary was by contract limited to $40,000?

MR. POWERS: I cannot concede that. I don't know what contract you are referring to.

MR. COOPER: May I have the contract documents again, your Honor?

THE COURT: Why don't you keep those, Mr. Cooper. It will be easier for you and indeed for me.

MR. POWERS: Well, they belong to me, your Honor. If they are to be put out here, we may need them for something.

Q I'll get to the contract in a moment, Mr. Sosa. This was an exhibit that was taken out of the contract --

MR. POWERS: What page, Mr. Cooper?

MR. COOPER: 393A.

Q I show that to you. Did you see that document in the contract documents, Mr. Sosa?

A I don't recall seeing that.

Q Now, does that refresh your recollection as to --

A It is vaguely familiar.

MR. POWERS: Your Honor, can I state for the record why I'm objecting to this? He showed the witness a schedule of compensation, not an agreement for compensation, and the schedule by its own terms relates to what the salaries were at some date around October '68.

THE COURT: The only possible fair question, it seems to me here, Mr. Cooper, is did he see or consider these things in August of 1972.

MR. COOPER: Yes.

THE COURT: I think if you just put it that way we would move much quicker. We would not have these arguments and we would really get to something more important.

While we have had this interruption, Mr. Sosa, who instructed you to do this? Do you remember?

THE WITNESS: Mr. Hatcher.

THE COURT: Hatcher. Did Hatcher tell you what your purpose was to be in doing all of this work in August of

1972?

THE WITNESS: Yes, it was a general direction to reconstruct the earnings during this base period from a cash to an accrual basis.

THE COURT: That was as far as you understood the purpose to be?

THE WITNESS: That was the broad purpose, yes.

Q Did you understand that it was in connection with papers that were to be submitted in connection with the litigation?

A Yes, I did.

THE COURT: Hatcher mentioned that?

THE WITNESS: Yes.

Q Did Hatcher also mention that there were instructions from counsel as to what was to be considered in preparing these documents?

A Yes, there was consultation and it was so told.

Q Okay.

Did you meet with counsel?

A Yes, I did.

Q Now then, did counsel tell you that there was a Mr. McIntyre who had been the treasurer of this company at the time of this transaction?

MR. POWERS: Object to any questions relating to

conversations with counsel when he was acting as a financial officer of Titan and conferring with counsel.

THE COURT: I am inclined to agree, but perhaps there is more to this than a conversation. You do not really want the details.

MR. COOPER: No, not at all. All I want to know is:

Q Did you find out that Mr. McIntyre had been the treasurer?

A I knew that.

Q Did anybody tell you, Mr. Hatcher or anyone else, tell you that Mr. McIntyre was the person who had inquired of Mr. Faggen what the adjustments were that he had agreed upon with Mr. Kaufman?

MR. POWERS: Objection. It is hearsay and I think --

THE COURT: I would agree on that basis plus a few others. It just sounds too argumentative.

Q Mr. Sosa, when you made your assumptions in preparing this exhibit, those assumptions were made based upon instructions from Mr. Hatcher, as you just said, correct?

A Correct.

Q All right. I see in the preparation of this Exhibit 10 that you didn't take into account as an add-back

to net income for the years in question the amount of pension overfunding; is that true?

A That's true.

Q Did you know that the pension was overfunded for those years?

A I had been informed by the Faggen Group management that that was the case.

Q Then on Exhibit 1, which this is a typed copy of so that you can read it, this was the exhibit that you had been referring to, was it not, that Exhibit 1?

A Yes.

Q You will notice that there is an item there for pension overfunding prepayment, isn't there?

A Right.

Q Now, you determined that among yourselves, that's you and Mr. Hatcher, that you were not going to give effect to that adjustment, right?

A That's right.

Q Even though the parties themselves may have agreed to give effect to that adjustment?

A I don't know that there was such an agreement.

Q I understand that. But you didn't know, for example, what the basis of the preparation of that document was, Exhibit 1, in and of itself, did you?

A Well, no, for this purpose of preparing these base year earnings restatement, it was not pertinent.

Q So that you were arbitrarily determining what you would include in and what you would exclude, right?

A I wouldn't say arbitrarily. As I said at the outset, I was preparing these statements in accordance with generally accepted principles of accrual accounting.

Q Well, if you were doing that, generally accepted principles of accrual accounting would have meant that you would have had to take, for example, into account, work in process in order to accomplish that?

A You are talking about the pension?

Q Not to the pensions. You just said a moment ago that you prepared your paper in connection with and in accordance with generally accepted accounting principles?

A Right.

Q One of the first things you did was to violate it when you didn't take into account work in process for the earlier years, isn't that so?

A Which work in process are you referring to?

Q When you looked at fees and retainers in order to be able to determine what the work in process was in any year, you would have had to have had ledger material in order to base that, wouldn't you?

A Well, you will have to ask me on particular items because a sweeping statement like that just --

Q Didn't you testify --

A -- I can't respond to.

Q Didn't you testify earlier today that on the fees and retainers items you simply looked at the billings on each of the years and made a recalculation as to what would have been billed in one year and collected in the next?

A No, what had been billed in each year, substituted in -- in any single year I substituted the billing rather than the cash collection.

Q But in order to know whether or not that was appropriate, you would have had to have taken into account work in process, wouldn't you?

A Well, if you want to split hairs, I suppose you would, yes.

Q That's what generally accepted accounting principles would have required, wouldn't it?

A But in this case the fees were not that great in any individual case, so that there was a tendency for earnings to equal -- for billings to equalize themselves from one year to the next.

Q What you were doing, Mr. Sosa, really, was in itself a calculation which was not in accordance with

generally accepted accounting principles, was it?

A I said it was. You say it is not.

Q Didn't Mr. Brandenberg say it couldn't be done in accordance with accepted accounting principles?

A Mr. Brandenberg is entitled to his own opinion.

Q Would you say there's a difference of opinion?

A I would say there is.

Q All right. Would you say that it is a matter by which accountants can differ?

A I think the consensus among accountants is contrary to what Mr. Brandenberg said.

Q The question is, would the accountants differ?

A I don't know what other accountants would say in general. I know what I would say.

Q All right.

Mr. Sosa, when you deleted pension overfunding, you did that without consultation with any of the persons who had negotiated this transaction, isn't that so?

A When you say delete, I'm not sure that is the way I would put it because --

Q All right. Let's see if we can just respond to my questions.

MR. POWERS: Could the witness be permitted to finish his answers, your Honor.

THE COURT: Mr. Powers, that is rhetorical on your part. I believe, though, that I will be glad to ask Mr. Sosa if he did not finish. If so I will allow him to finish. I think he did but if you tell me --

THE WITNESS: No, I didn't finish.

THE COURT: What next do you want to offer?

THE WITNESS: Well, the question was put in terms of my deleting --

THE COURT: No, no. Don't let the lawyers fool you. We are not asking you to argue with us. You apparently tell me that you have something to add. Feel free to add but you do not have to argue with this lawyer or with me. I just want to know what it is you want to add. You said you did not complete your answer and I am inviting you to complete it. But you do not have to argue with me because I do not need to be argued with. I am not arguing with you.

MR. POWERS: Your Honor --

THE COURT: Would you please not interrupt further and give Mr. Sosa a chance? Down. That's the boy. Go ahead, sir.

THE WITNESS: Well, would you please repeat your questions?

THE COURT: Surely.

(Record read.)

THE WITNESS: First of all, my purpose here was not to delete anything and so the answer to that is no. And my answer to the second part of your question as to consultation with the parties who negotiated the deal, the answer is no there as well.

Q Mr. Sosa, in the preparation of Exhibit 10, if I may stand alongside of you and point out what I'm talking about --

A Sure.

Q -- you have made certain accruals to convert from cash to an accrual basis.

A Correct.

Q And you come up with the net income after taxes on accrual basis, right? Then you go into Faggen's proposed pro forma adjustments, add back federal, city and state taxes, accounting services income, deduct investment income and reduction in Harold Faggen's salary, $50,000 limit; correct?

A Correct.

Q All right. Now, if you look at the exhibit which you were using as to what constituted his proposed pro forma adjustments, among them was an item for pension prepayment; isn't that so?

A That's right.

Q All right. So that you have not included among

the items here the item which he had proposed in his pro forma; isn't that so?

A That's correct.

Q And then in addition to that, while you deducted investment income on an accrual basis of accounting, you didn't accrue the appreciated value of the securities in the portfolio from 1965 to 1968, did you?

A No, I didn't.

Q In order to properly accrue from -- going from cash to accrual basis, you would have had to make that adjustment, wouldn't you?

A No, I would not.

Q You would not?

A No.

Q So that you are saying that you would not accrue the appreciation of the securities from their cost to their value on those dates in question but at the same time you would deduct the investment income which those assets produced; is that what you are saying?

A That's what I'm saying. May I offer an explanation for that?

Q No. I just wanted to know what your answer was.

MR. POWERS: I object to that, your Honor. The witness should be permitted to finish his answer.

THE COURT: Please, Mr. Powers. I would respectfully suggest that you are inflaming the situation constantly. You will have an opportunity, as you well know, to let Mr. Sosa volunteer anything you and he care to have him say. But this is just debilitating to listen to your ideas about what should be done by everybody in this case.

Now, have you any more questions, Mr. Cooper?

MR. COOPER: Just one, your Honor, and I'm finished. One line, anyhow.

Q Mr. Sosa, the very next to the last line on the total represented net income, pretax per Faggen --

A Right.

Q -- where did you get the representations from as to what the represented net income was?

A I believe there's a document similar to the ones you have shown me that represents those earnings.

Q Do you mean Exhibit 1?

A No, there's another document that lists by years these earnings.

MR. POWERS: Is this what you are looking for, Mr. Cooper?

Q Are you talking about this document which is Exhibit A to the complaint?

A Yes, that's the one.

Q Does there anywhere appear on here the words, "represented net income?"

A I don't see it.

Q Well, were those words which were attached to that exhibit, were those your words or were they somebody else's words?

A My words.

Q Where did you get the information that this was a representation of net income?

A Well, my definition of the term represented here means as represented in this document.

Q You mean this document was the source for your statement, right?

A That's correct.

Q Okay. Did you know that the net income, as reported on the tax returns, was substantially less than this item?

A Yes, I knew there was a difference.

Q Did you also know that the only thing represented in the contract documents was the reported income on the tax returns?

A Yes, I did see copies of tax returns in the document.

Q As a matter of fact, Mr. Sosa, your audit

confirmed the fact that the figures, as shown on the tax returns, were the earnings for the particular years in question, didn't it?

A Well, the tax returns represented reported income, reported taxable income.

Q Yes. And on a cash basis, when you went through the books of the Faggen Companies, your audit verified the fact that that was the net income in each of those years, isn't that so?

A No, because there is a difference between taxable income and accounting net income. And they are not necessarily the same. In fact they differ most of the time.

Q But with respect to what was represented in the contract documents, the amounts shown as the reported net income were verified by your staff in Titan at or about the time that these exhibits were prepared, wasn't that so?

A Are you referring to the audit that was made in 1972?

Q Yes.

A Earlier, before I stepped into the scene?

A Well, did you see an audit that had been prepared showing what those figures were?

A I saw some papers, some work papers, on that. As I said, I used some of them as basic documents to conduct my

own redetermination of accrual income.

Q Do you know for a fact, Mr. Sosa, from the exhibits that were prepared in this case, among the Exhibit E series, which Exhibit 10 is one, that the verification of the reported net income by Titan was almost dollar for dollar what was represented in the contract documents as the reported net income?

A Which representation are you talking about?

Q Are you aware -- let's go back one step -- are you aware, Mr. Sosa, that there were contracts entered, these contract documents in front of you, in which Mr. Faggen made a representation as to the net income of this company per tax returns and annexed to those contract documents were the income tax returns for the years in question? Are you aware of that?

A Yes, I'm aware that the tax returns were filed, were made part of the --

Q That was by contract the represented net income, are you aware of that?

MR. POWERS: Objection, your Honor. That's your province, I believe, to determine.

THE COURT: No, no, no. But I am afraid I am not sure Mr. Sosa got that. Do you want that repeated?

THE WITNESS: Yes, please.

THE COURT: Put that again. I am not sure I understood you, either.

MR. COOPER: Let me withdraw the question, then.

Q Mr. Sosa, the contract has a representation and warranty clause in which Mr. Faggen, in selling his companies to Titan, represented what the net income of his companies were as reported on his tax returns; are you aware of that?

A I'm not aware of it in that context. I'm aware that tax returns were made part of the agreement but --

MR. POWERS: What page are you on?

MR. COOPER: 61 and 62 of the appendix.

Q This is from the contract documents, Mr. Sosa. Do you see it says, "Representations and warranties of seller?" That's Mr. Faggen, right?

A Yes.

Q And it says, "The seller represents and warrants the following as of the date hereof." And that was December 2nd. And then 3.1 financial statements and then it sets forth what the financial representation is; isn't that so?

MR. POWERS: Objection for the same reason, your Honor. The contract speaks for itself.

THE COURT: That is not the point of the inquiry, I am sorry, Mr. Powers. I do not agree. Go ahead.

A I see nothing here about representations. It

merely states that the tax returns are attached here. I think the representation is to the filing of the tax return rather than to anything else.

THE COURT: Mr. Cooper, I am afraid this witness either does not understand you or maybe I do not understand you.

MR. COOPER: My question --

THE COURT: Let's try this again. We all seem to be like freighters passing each other in the night here. Let's go back now. Make it very clear what you want from him.

Q Mr. Sosa, so that you will understand the purpose and thrust of my question, let me explain it to you.

There were contracts entered into between the parties. You read those contracts, did you not?

A Yes, I did.

Q Now then, among the contract documents there was a provision for a representation and warranty of the financial condition of the Faggen Companies as of the time of the sale, and in showing what the financial condition was, there were attached tax returns including income statements and balance sheet and supporting schedules of the company for each of its last five complete fiscal years.

A Right.

Q Now, then, did you understand at the time that

you were conducting or preparing your work, that Mr. Faggen had stated to the buyer, Titan, that the financial condition of his companies, his earnings history, was as shown on the tax returns and that was what he represented to the buyer?

MR. POWERS: Objection for the same reason, your Honor.

THE COURT: Is that your question?

MR. COOPER: Yes.

THE COURT: I do not agree with Mr. Powers.

MR. COOPER: I withdraw the question, Judge.

THE COURT: But I must say --

Q What I am trying to get at, Mr. Sosa, so that you understand, did you understand that Mr. Faggen had represented to this company through a contract as to what the financial conditions of his companies were on September --

THE COURT: Sorry. I am going to object to that. We are not putting him through the paces of contract law. I thought, and I will only permit, an inquiry of whether or not he knows if it were the fact, to his knowledge, that his company checked these tax return figures.

MR. COOPER: Yes, that's really what I was trying to get at.

THE COURT: Fine. Let's ask him that. We wasted fifteen minutes trying to get at this. We are really just

over trying this case to the point of counterproductivity.

Let me ask you, Mr. Sosa, so we can get down to this: Taking a look at those tax returns, which as you well know were incorporated by reference into the contract as representations by the seller Faggen, is it the fact, to your knowledge at least, that sometime in 1972 someone within Titan Group checked or audited those figures?

THE WITNESS: Yes, it is.

THE COURT: Do you know what the comparisons of that audit brought forth or that check of those figures set forth in the tax return? In part, as you have already told us and at least as I understand, tax income can be very much different from net income from an accountant's point of view particularly, but what roughly was the comparison, if you know?

THE WITNESS: No, I don't know what it was.

THE COURT: You do not know?

THE WITNESS: No.

THE COURT: Do you know who did that audit or checking of those tax return figures submitted by the seller Faggen?

THE WITNESS: No, I don't.

THE COURT: You do recall seeing some papers, that's about all?

THE WITNESS: Yes.

THE COURT: I see. Thank you very much.

Anything else?

MR. COOPER: I have, if I may, your Honor -- I think I can show the witness the audit that was conducted and see if he remembers that.

THE COURT: Fine. All right.

BY MR. COOPER:

Q Mr. Sosa, if you look at pages 257A -- you have that precise information, it is now Exhibit 10 -- that shows you, by year, what the cash basis income statements were for the Faggen Companies in each of the years in question, doesn't it?

A That's right.

Q All right. All we have to do then, as a matter of fact, is simply compare those -- you saw those numbers, didn't you?

A Yes, I did.

Q Did you check those numbers against the amounts reported on the tax returns?

A Yes, I did.

Q And are they the same?

A I reconciled them.

Q Are they virtually dollar for dollar what the tax

return showed?

A Yes, the tax returns are based on these figures.

Q All right. And the audit showed that the statements as shown on the tax returns were correct?

A The tax returns were correct as far as they showed.

MR. COOPER: That's all. No further questions.

MR. POWERS: Could I have that Brandenberg memorandum, please?

MR. COOPER: He's got it.

REDIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Sosa --

MR. POWERS: What's the exhibit number of the Brandenberg memorandum? K?

MR. COOPER: Yes.

Q I show you Exhibit K by Mr. Brandenberg, where he says, "The details of time and expenses don't exist, it won't be possible to prepare full accrual basis;" do you know whether this comment relates to the work you were doing at the Faggen Companies or relates to some sort of certification by Touche Ross of your work after it was done?

MR. COOPER: I object to that. He said he never spoke to anybody about it.

THE COURT: Whether he spoke to anybody or not, I think it is probably fair that he tell us what his understanding of this was.

Q Do you understand the question?

THE COURT: How did you interpret that? I think that is the question the lawyer was trying to ask you.

Q How do you interpret what Mr. Brandenberg is trying to tell you in the memorandum? Today's the first time you saw it.

A The last paragraph is what is pertinent and I will quote it: "Since the details of time and expenses incurred either don't exist or are unable to be located, it won't be possible to prepare full accrual basis financial statements on the companies acquired from Mr. Harold Faggen for their respective fiscal years ending in 1965, 1966, 1967 and 1968." So as not to belabor the point, nevertheless, I would just like to repeat it, when I approached my work here in converting from the cash to the accrual basis, my yardstick for revenues was the date or the time of billing. I didn't concern myself with time records to convert what is referred to here as a full accrual basis or a work-in-process approach because I didn't consider that a material factor. The job -- I agree the job would be impossible but it would not be pertinent to this whole thing.

THE COURT: Excuse me, Mr. Sosa. I am sorry, you were not asked that. The question is how did you interpret -- we all agree apparently you have never seen the so-called Brandenberg memorandum until today -- and the question which the Court has permitted and which I would like an answer to, if you do not mind, is simply, how do you interpret that document?

THE WITNESS: The way I interpret it, it is not possible from the Faggen records to draw up an accrual basis financial statement.

THE COURT: Anything else, Mr. Powers?

Q That Brandenberg memo was written in April of 1972, wasn't it?

A Yes.

Q In April of 1972, was Titan having any problems getting at the official books and records of the Faggen Companies?

MR. COOPER: If your Honor pleases, I think this witness said he came to work in July of '72.

THE COURT: That is right.

Q I'm asking, to your knowledge, had there been any problems prior to your coming?

THE COURT: Whoa, Mr. Powers. The objection is well taken. I will not take hearsay as to what I regard as a

very likely collateral matter, notwithstanding these pleadings, which you have blessed this record with. Now, that is just going a little too far and you know it.

Q I show you a memo dated August 7, 1972, which we will mark 16 for identification.

xx (Plaintiff's Exhibit 16 marked for identification.)

Q I ask you, Mr. Sosa, if you received that memo.

A Yes, I did.

MR. POWERS: I would like to offer this memo in evidence, your Honor.

THE COURT: We will mark it for identification, first of all.

Show it to Mr. Cooper.

While we are waiting, Mr. Sosa, if anybody asked you I did not catch it, but what are you doing now, sir, with what firm are you?

THE WITNESS: I'm a financial consultant with the YMCA of Greater New York.

THE COURT: When did you leave Titan Group?

THE WITNESS: In June of 1973.

THE COURT: Thank you.

MR. COOPER: I'm going to object to the introduction of this, your Honor.

THE COURT: This is a statement, as Mr. Sosa has said, but on what theory are you now offering it on redirect?

MR. POWERS: The witness was questioned as to the reasoning behind his not giving any income add-on effect to the pension overfunding and this is a document showing the nature of the investigation he did in '72 when he was working up these figures. I was next going to ask him --

THE COURT: Look, Mr. Powers --

MR. POWERS: -- what he did.

THE COURT: Fine. We could go on forever in this trial, which has already gone far too long with minimal productivity, and I just do not understand you. No one is questioning that he did some investigation. He told us that. But you are probably slipping this in to prove what an out-of-court declarant, one Basil Castrovinci, said and I do not think that is fair; particularly since the witness and you have given me no basis to see any kind of relevance for this at all.

MR. POWERS: Could I ask the witness a couple of questions on how he obtained that document?

THE COURT: Fine, do that.

MR. POWERS: I didn't do that before offering it. Let me do it now, your Honor.

Q Mr. Sosa, do you recall the circumstances under

which you received that letter?

A Yes. We were trying to make a determination as to the proper amount to accrual -- to accrue for pension costs in the base years.

Q Did you ask Mr. Castrovinci to provide some information to you?

A Yes, I did.

Q Was this letter obtained by you at the time you were conducting your audit work?

A Yes, it was.

MR. POWERS: May I reoffer it now, your Honor.

THE COURT: There was never any question about that before, Mr. Powers. You apparently do not understand what I am trying to get at and I will accept the blame for that, although I have some doubts on the subject, to be perfectly blunt about it. The fact of the matter is I do not see its relevance even from your adversarial viewpoint.

MR. POWERS: What is your pleasure on the exhibit, your Honor? I won't --

THE COURT: I just do not get it. You explain to me what it does from your point of view.

MR. POWERS: It is to show there was an average pension cost and you could not just take $64,000 and add it in and multiply it as ten times income.

THE COURT: Accepting that as a reasonable construction, what does it do for you?

MR. POWERS: In the year '68 it was roughly $15 to $30 thousand which began the reasoning that this gentleman did in deciding not to add $64 thousand to income. Now, I'm going to ask him some more questions on what reasoning went into that.

THE COURT: I am sorry, but it will never get done. Forgive me, but I have got to expedite this.

MR. POWERS: It is my last point of the day with this gentleman, your Honor.

THE COURT: Mr. Sosa, tell me, in looking at that letter, did you use that information from this man Castrovinci in any way in preparing Plaintiff's Exhibit 10?

THE WITNESS: No, I didn't.

THE COURT: I am going to sustain the objection.

Q Mr. Sosa, what was the principle --

THE COURT: Excuse me, may I have that again so I can make some notes? Thank you very much.

Go ahead.

Q Mr. Sosa, what were the accounting principles you used in determining how to handle the pension overfunding item that is in Exhibit 1 and the vacation pay allowance item that is in Exhibit 10?

MR. COOPER: If your Honor please, I'm going to object to this as improper redirect.

THE COURT: I agree. Sustained. There is no issue made about that at all.

MR. POWERS: Can I ask the question, your Honor, what was the accounting principle used in not adding in anything for pension overfunding?

THE COURT: He has already told us the accounting principle. Are you trying to cross examine your own witness? I do not understand you.

MR. POWERS: I am trying to establish, your Honor, the logic that underlay the decision not to include the $64 thousand in and not to include anything as an overpayment for the prior year. I'm trying to establish the logic that was in the accounting work he did.

THE COURT: I have gotten so I do not really quite trust what you are saying. It sounds to me like testimony. If you want him to explain some figure in that, fine. But this sounds like a speech from you, that is what bothers me.

MR. POWERS: I follow you now, your Honor.

Q In Exhibit 10, would you explain the vacation pay items across the four years to the Court, how those were determined?

MR. COOPER: Objected to as improper redirect.

THE COURT: No, I am going to allow this. You may be right but we have got to bring it to an end. With this interruption, Mr. Sosa, have you got the question?

THE WITNESS: Yes, I have, your Honor.

THE COURT: All right.

A In the 1968 balance sheet there was an item for accrued payroll of some $60 thousand, I believe, approximately $60 thousand, of which $25 thousand related to employees other than Miss Dogan and Mr. Faggen. The balance of it represented vacation pay accruable to Mr. Faggen and Miss Dogan.

What I did was reallocate to the four years of income the accruable portion of that accrued vacation liability so that each year would bear its estimated weight of that cost. And I didn't include either Mr. Faggen or Miss Dogan's accrual there because Miss Dogan's vacation pay was going to be picked up by Mr. Faggen and I didn't consider Mr. Faggen's vacation pay to be a proper charge against income of any of these four years since he was the major executive of the corporation.

Q Are you saying in effect for this $59 thousand item, you only took a deduction from income over the four years of a total of $10 thousand?

A Yes, I did. The relevant portion.

Q And you didn't take off any more than the $10 thousand; is that right?

A That's right.

Q Now, did the handling of this vacation pay allowance have anything to do with your ultimate handling of the pension overfunding item?

MR. COOPER: I object to the question, your Honor.

THE COURT: Overruled.

A Well, we never could determine just what the pension overfunding was, so if such was the case, we felt that perhaps here we take a conservative approach and if there was some credit in the pension fund, which incidentally was not available to the corporation, because of the usual pension fund trust arrangements that are made, that these would be offset.

Q Are you saying essentially you considered those two items a wash?

A Well, yes.

Q One was a deduct and one was an addition to income and they offset each other?

A Very roughly, yes.

Q Thank you.

THE COURT: Mr. Sosa, thank you very much.

MR. COOPER: Your Honor, may I just ask one

question before we conclude with the witness?

THE COURT: All right.

RECROSS EXAMINATION

BY MR. COOPER:

Q Mr. Sosa, you could have ascertained what the amount of the net asset value of the pension fund was as against the accrued liabilities to the pension fund since the company that handled it was the actuarial firm itself, couldn't you?

A That's correct.

Q You didn't ask that question?

A No, I didn't.

MR. COOPER: That is all.

(Witness excused.)

THE COURT: We will take a morning recess.

(Recess.)

MR. POWERS: I would like to call as my next witness, your Honor, Miss Rose Dogan Faggen, please.

R O S E D O G A N F A G G E N, called as a witness, having first been duly sworn, testified as follows:

MR. COOPER: Your Honor, would it be appropriate to note for the record that Mrs. Faggen was not one of those listed as a witness.

THE COURT: Oh, you are quite correct. There

have been some others, too, but I think Mr. Powers has virtually admitted to us yesterday that he has changed his mind several times since that list was furnished to you and to the Court.

All right.

DIRECT EXAMINATION

BY MR. POWERS:

Q Mrs. Faggen, could you tell the Court when you started working at the Faggen Companies?

A In April 1955.

Q And you were there throughout that period until 1973; is that right?

A January 26, 1973.

Q Now, I take you back to 1968. What was your title then, Mrs. Faggen?

A President.

Q When did you become president?

A 1965.

Q Did you remain president after 1968?

A Yes, I did.

Q Were you also in charge of the pension operations of the Faggen Companies?

A I don't know what you mean by in charge of pension operations.

Q Well, were you responsible for keeping the pension records of Harold Faggen Associates, Inc.?

A During what period?

Q 1968.

A I kept some record, yes.

Q And you kept them in '67, '66; is that right?

A Yes.

Q And you kept them thereafter; is that right?

A No.

Q You didn't keep them thereafter?

A You have to give me dates.

Q Well, didn't you keep the pension records until about 1970?

A Yes.

Q All right. Now, in that connection you kept records of your salaries, didn't you?

A The pension was based on salary.

Q Right. Was your salary reduced between 1968 and 1969?

A It was reduced when the merger took place.

MR. POWERS: Would you mark this for identification, please.

xx (Plaintiff's Exhibit 17 marked for identification.)

Q Miss Dogan, I show you a pension record, Harold Faggen Associates, with the name Rose Dogan, and I ask you if the entries on that are in your handwriting for the amounts in the calendar year, Exhibit 17 for identification.

A Not all the figures are mine, no.

Q Are they in your handwriting down through 1970?

A No. Not all the figures are in my handwriting.

Q Is the handwriting for 1968, 1969 your handwriting, the ink?

A Yes, it is.

Q Does it show for 1968 $46,399.99?

A Yes, it does.

Q Dies it show for 1969 $50,000?

A Yes, it does.

MR. POWERS: I would like to offer this in evidence, your Honor.

MR. COOPER: I have no objection to it.

xx (Plaintiff's Exhibit 17 received in evidence.)

Q Mrs. Dogan, did you also --

A It is Mrs. Faggen.

Q Excuse me. Mrs. Faggen, did you also keep pension records for Harold Faggen in your handwriting? And I show you Exhibit 18 for identification.

xx (Plaintiff's Exhibit 18 marked for

identification.)

Q Is that written in your handwriting through 1970, the ink entries?

A The ink entries are my handwriting through '70.

Q Thank you very much.

MR. POWERS: I would like to offer this in evidence, your Honor.

MR. COOPER: I have no objection.

xx (Plaintiff's Exhibit 18 received in evidence.)

Q Did those exhibits, 17 and 18, accurately state the salaries paid to yourself and to Mr. Faggen for the period which you made the penned entries on?

A They stated "with explanation."

Q I see. Mrs. Faggen, you were president of the company in the fall of 1968, weren't you?

A Yes, sir, I was.

Q What were the capabilities of the data processing operations in the Faggen Companies in the fall of 1968, what did they do?

MR. COOPER: I object to that as irrelevant, your Honor.

THE COURT: I must say, Mr. Powers, we are trying all kinds of claims but they do not seem to have anything to do with the federal claim stated in the pleadings

here.

MR. POWERS: Sir, the claim stated in the pleading is the Exhibit 3, is misleading and omits certain material information. On page 2 there is a description of computer capability. I'm going to inquire of this witness with respect to the truthfulness and completeness of that.

THE COURT: All right. Well, I quite agree with you, you are entitled to inquire about the relevant portion here on page 2, perhaps; however, an open-ended question like what is the computer capability --

MR. POWERS: Forgive me, your Honor, I will rephrase it.

THE COURT: -- boggles one's mind . I do not understand, that perhaps you know of certain things about Mrs. Faggen that I do not, but I think you have got to lay some kind of a groundwork.

MR. COOPER: Your Honor, I would just like to point out --

THE COURT: I would just like to indicate that your objection has just been sustained for the time being. I am going to give Mr. Powers his head with respect to page 2 of Plaintiff's 3. Now, you are not being aggrieved and all you are doing is delaying things further with no profit to Harold Faggen's side of this case. Go ahead without any

interruption until we get to another question.

Q How many people did you have in the computer department of the Faggen Companies in the fall of 1968?

A I really don't recollect as to the computer and the actuarial.

Q Well, you had William Mosley in data processing, didn't you?

A Yes, we did.

Q Did you have anybody else?

A Yes, we did.

Q Who?

A There was Herbert Kee, Ethel Mott, I believe we had five key punch women. I don't recall what period in time but there was a Mr. Schoenberg.

Q My question is restricted to the fall of 1968, Mrs. Faggen.

A I can't recall the specific period of time.

Q Well, in '68, in data processing, William Mosley was the highest paid individual, wasn't he?

A I believe he was.

Q His salary was about $15 thousand a year, wasn't it?

A I could not tell you at this point.

Q If I showed you a list of salaries of consultants,

actuaries and the one data processing individual, William Mosley, to refresh your recollection --

A No, the only thing that would refresh my recollection was a -- records I kept in my own handwriting.

Q But in any event --

A This doesn't refresh it.

Q William Mosley was the highest paid one?

A Yes, he was.

Q Can we agree that William Mosley was paid around $15 thousand a year at that time?

A It might have been more, I don't know.

Q What were William Mosley's qualifications, if you know?

MR. COOPER: Your Honor --

THE COURT: You are objecting?

MR. COOPER: Yes, I am, Judge. I don't know at what point it becomes burdensome to the Court to make these objections and I don't want to burden you with it --

THE COURT: I see your point. Look, Mr. Powers, you pointed to me page 2 and I am going to allow that. I understand that part. But if we are going to do it this way, from your own point of view I cannot think of anything more absurd.

For example -- well, I have had to intervene too

much just to get this dreadful, dragging, endless dispute moving. I hate to intervene again, but I cannot imagine a worse way of going about it and I am concerned because it will only delay us further.

Now, you have page 2 in front of you and I would think a first-year law student would know how to get at this better than getting the capabilities, as Mrs. Faggen recalls them, of various individuals. At least at this point. Later perhaps, but not now.

Q Mrs. Faggen, what was the computer capacity that the company had in the fall of 1968?

A You will have to be more specific.

Q Well, I will read you a sentence from Exhibit 3, "since we have both actuarial and computer capacity" -- now I'm asking you what was that computer capacity in 1968?

A With respect to what?

Q With respect to the whole business that you were doing where computers wereused.

A Our evaluations were being done on computers.

Q Were they computers in house?

A Yes, they were in house.

Q What computers were they?

A I believe we had the 360/20.

Q A 360/20. What kind of computer is that, do you

know?

A I'm not a computer expert.

Q How long did you have that in place?

A I could not tell you.

Q Do you know what the monthly lease on that was?

A No, I don't.

Q Would it be fair to say --

THE COURT: Mr. Powers, please, now come on. The real key portion of this is, what is represented in that paper? To take your point of view. Let's get to it without massaging the dreary computer business in detail.

Q Were you programming a completely automated union office in the fall of 1968?

A I was not programming anything.

Q Was there a completed program for a completely automated union office?

A I believe it was being developed or being run simultaneously with a union office for verification.

Q And it was under the charge of this one $15,000 a year employee William Mosley; is that right?

A I don't know what his salary was. I believe I told you that.

Q Did you have a very substantial client who had been obtained for this program that you were trying to

develop?

A Yes, we did.

Q Had you signed the client up with a contract?

A I don't recall whether there was anything written or not.

Q Did you have any discussion on whether the fees from that client would be sufficient to pay all development costs?

A I didn't have any discussion on that.

Q Do you know what the fees were to be paid by that client for the program?

A If memory serves me, it was in the area of $50 thousand.

Q Was there a contract for that $50 thousand?

A I don't recall whether it was written or whether it was just approved by the people in charge of the fund.

Q Now, you were not programming any automated pension plan calculations for employers, were you?

A There was a program being developed.

Q Did you have any clients for that program?

A Mr. Frank was very enthusiastic about it, he was going to get us all kinds of clients. They ultimately set up a sales organization for it.

Q But in the fall of 1968, you didn't even have

any small or medium size employers as clients, did you?

A Did we have any small or medium? I could not tell you. We might have had some.

MR. COOPER: Your Honor, the question is misleading. The document doesn't say anything like that.

THE COURT: Well, before we get to that, I agree it is misleading to me, certainly, and I would think from your selfish viewpoint, Mr. Powers, you would think it is. When you say the fall, do you mean prior to September 30, 1968, after, both of what?

MR. POWERS: Prior to October 9th, the Titan Board meeting where this memo was read by Mr. Frank.

THE COURT: Well, whatever you do. But at least make that clear for all of us, will you, including Mrs. Faggen.

Q Mrs. Faggen, when I say the fall of '68, I'm referring to the period before October 9, 1968.

Now, did you or anyone, that you know of in the Faggen Companies, in this period before October 1968, have any discussions with stock brokers for selling them these completely automated pension plan calculations?

MR. COOPER: Your Honor, I'm going to object.

A I don't know what you are talking about.

Q Let me read you this sentence.

THE COURT: Just a minute, Mr. Powers. I am going to sustain the objection because I am not at all sure at this point what Mrs. Dogan had to do with all of this, if anything.

MR. POWERS: She was president, sir.

THE COURT: I know you have all kinds of ideas about it, but the point is we are trying to make a record here for the Court, not for your inner music, which I am not about to rely on. Now, let's go back.

May I inquire, because this lawyer does not seem to want to do so, Mrs. Faggen, but in this period, let's say the late summer or early fall, prior to October 9th, taking Mr. Powers' expression of it, did you have anything to do with the computer side of the operation in the direct sense?

THE WITNESS: Not to any great extent.

THE COURT: To what extent did you, may I ask that?

THE WITNESS: I knew what they were doing, I knew what the costs were and I set salaries.

THE COURT: I see. Did you have anything to do with obtaining clients in this area?

THE WITNESS: No, I did not.

THE COURT: Negotiating with computative clients?

THE WITNESS: No, I did not.

THE COURT: Who did that sort of thing at that time?

THE WITNESS: I believe Mr. Faggen was the only one who brought in clients.

THE COURT: I take it you don't or at least at that point did not consider yourself to be a computer specialist of any kind?

THE WITNESS: That's quite correct.

BY MR. POWERS:

Q Mrs. Faggen, which of the clients of the firm did you deal with in the fall of 1968 who were getting any computer services from the firm?

MR. COOPER: If your Honor pleases, I would like to direct your Honor's attention to 191A of the appendix which is the minutes of the meeting as to what Mr. Frank said to the Board, and point out to your Honor that none of this was any matter which was a matter for Board consideration, assuming that there is any basis for this claim at this late stage in these pleadings.

THE COURT: I did not say there was, Mr. Cooper. What I am trying to do is two things: to expedite this dreadfully protracted picky, picky personal dispute which we have to treat as a serious litigation, all points of view,

the plaintiff and the defendant; and, second of all, to give this lawyer some latitude; and, third of all, help him freme some questions that are reasonably intelligible to the witness and even indeed, if I may say so, to the Court.

Now, why is it that just because we are admitting some line that that means that the game is proved? It is not and you should know that and I want no more objections on that ground.

Look, Mr. Powers, I do feel, however, that what is your point from your own adversarial point of view of asking a question like this? I am sticking by you on page 2 but I am not sticking by you by your convoluted notions of something that is so obscure that I cannot imagine a man of your intelligence would even ask such silly questions. Now, let's go back.

Put a question so we understand you.

Q Now, I read to you a sentence from page 2 of Exhibit 3: "We expect" -- let me read you both sentences: "Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations for small and medium size employers."

Now, did you know of any completely automated pension plan calculations in being before October 9, 1968?

A They were in the process of programming them.

Q Did you even have any employers as clients at the time in the Faggen Companies?

A Of course we had employers as clients.

Q How many clients did the Faggen Companies have at that time overall?

A I don't know, I'd have to see the books.

Q How many employer clients would you say they had?

A I'd have to see the books.

Q Let me read you something else: "The availability of package pension plan services at very reasonable prices will enable stock brokers to service the pension plans instead of leaving them for the insurance companies."

Did you have a package pension plan service for stock brokers?

A They were in the process of programming them.

Q Did any stock brokers use your data processing services in '68?

A No.

Q Did any lawyers use them?

A I don't believe so.

Q Did any accountants use them?

A They might have used it in connection with pension plans.

Q What accountants?

A I don't know.

Q Do you know of any contacts made with stock brokers, accountants or lawyers to provide these services in '68?

A No, I don't.

Q Excuse me, ma'am?

A I don't.

Q Now, Mrs. Faggen, I show you a list which I would like to mark, please.

xx (Plaintiff's Exhibit 19 marked for identification.)

Q In the year 1968, did the Faggen Companies lose the Carpenters' Union, two Bartenders' Pension and Welfare Plan, Insurance Fund, Metro ILA, Upstate Printers Pension and Local 806 Teamsters Pension Plans as clients?

MR. COOPER: I'm going to object to all of this.

A I would have to --

MR. COOPER: There is no claim in this case.

THE COURT: Oh, yes, there is now, and there has been. Haven't you seen his proposed findings and conclusions?

MR. COOPER: I have seen his proposed findings, your Honor, but --

MR. POWERS: Judge Ryan, sir --

THE COURT: Now look, please. Why do you always

have to interrupt? Mr. Cooper is addressing an objection which is right. I do not understand you, Mr. Powers. I do not think you mean to be rude, but it is a very exasperating situation to deal with you in this trial. You always have to have the word of the moment.

Now, let's go back. Your objection is on what ground?

MR. COOPER: My objection is, your Honor, that if this is an action based on 10(b)(5) and on fraud that there was a requirement in this complaint to allege with particularity the particular items of fraud on which they were making claim. In the Siegel case that was specifically spelled out.

THE COURT: I know, but if I were to take that narrow view of the thing in this litigation to the depth which has been going on far too long already, as you all admit -- I took this on as a serious duty, to follow the instructions of what you apparently wanted to do and what the Court of Appeals quite sensibly directed be done, even though I got in the act long after the date set, to get this case resolved.

Now, we are going to get it resolved without all these picky, picky objections. I quite agree with you from a professional point of view the pleadings are less than

compelling in terms of draftsmanship, but the point is clear.

Now, I will sustain the objection on quite another ground, Mr. Powers. The year '68 is a long year. I believe it went the full twelve months, and I do not believe you disagree.

Now, I insist that instead of being cute and devious, you have got to be precise in what you are asking Mrs. Faggen. It does not help you to ask these willy wash, open-ended, argumentative, I-already-know-the-answers, at-least-I-think-I-do, kind of questions.

Now, let's go back. You have a piece of paper you have shown the witness.

MR. POWERS: Yes.

THE COURT: Would you care to give it back to her so she could look at it? I will permit any question designed to be clearly stated to the effect that you are asking what happened in the year 1968 prior to the time of -- you want to take October 9th? September 30th? I do not care, but something like that, you see.

MR. POWERS: All right, sir.

THE COURT: I insist you understand what I am getting at and I insist you listen to me without all this falderal. It is not helping you the way you are behaving in this case.

Now, you go ahead and put a question that is fair and reasonable within the issues. As you see them.

Q Mrs. Faggen, did Harold Faggen Associates lose the Carpenters' Union Pension and Welfare Plans as clients before June 30, 1968?

A I cannot place it in any time frame. There is a client ledger that would have that information.

Q Do you have a recollection that the Carpenters' Union was lost before October 9, 1968 as a client?

A No, I don't.

Q Was the Carpenters' Union and important client of the Faggen Companies?

A I don't know what you mean by an important client.

Q Well, were the fees from the Carpenters about $75 thousand a year?

A I would have to see the client ledger.

Q In 1968 were the fees from the Carpenters roughly equivalent to the ITU, International Typographical Union as a client?

A Offhand, I would say no.

Q ITU was probably your most important client in '68, wasn't it?

A In '68?

Q Yes.

A I don't know that it was the most important client in '68.

MR. POWERS: I have nothing further of this witness.

THE COURT: You know, Mr. Powers, while we are on the subject, you must have some kind of books and records.

MR. POWERS: I have them here with me, sir, and I'm going to put them in with other witnesses. These were a couple of preliminary questions because she was president and kept certain of the books. I'm going on to full proof with these documents in great details.

THE COURT: You keep telling us of all these wonders that are going to prevail, but I remind you we have been going for days.

MR. POWERS: I'm also going to finish my case today.

THE COURT: I have to applaud you for that good hope, but I am a skeptical man, Mr. Powers. But you are sure you do not want to ask Mrs. Faggen anything more?

MR. POWERS: No, I have all I need.

THE COURT: All right. Mr. Cooper?

CROSS EXAMINATION

BY MR. COOPER:

Q Mrs. Faggen, will you tell the Court the

circumstances under which your salaries were fixed by contract and what happened to those salaries shortly after the acquisition?

A Well -- my salary was reduced to $40 thousand a year and that is what I started to receive for, I would say, close to six months of 1969.

THE COURT: Sorry, I do not understand you. Your salary was reduced to $40 thousand a year?

THE WITNESS: Right.

THE COURT: Effective when?

THE WITNESS: I believe it was 1969, January 1st.

Q Then what happened?

A I received that salary for about six months and then Mr. Kaufman, who was then Chairman of the Board, at a meeting we had, said something to the effect that he didn't like his employees to be unhappy because of salary curtailment, and he would allow that my salary be restored. It was at this point that I believe Mr. Frank's salary was increased substantially and I had been officially told that the only reason my salary was being reduced was that they didn't want me to be making as much as Mr. Frank.

MR. POWERS: May I respectfully move to strike that, your Honor, it is all hearsay.

THE COURT: Well, it is not all hearsay, but it

is not responsive to what I understand the question of Mr. Cooper to be. I will receive it only to the effect that she was reduced as of January 1, '69, to $40 thousand.

But let me ask: Were you reinstated to some higher figure six months later?

THE WITNESS: Yes, retroactively. To January 1st.

THE COURT: So, in other words, the reduction never really netted out at all.

THE WITNESS: That's right.

THE COURT: What were you restored to, let me put it that way?

THE WITNESS: $50 thousand.

THE COURT: $50 thousand, all right.

Q Who was it who restored you to the 50?

A Mr. Kaufman, when he was Chairman of the Board.

MR. POWERS: May I move to strike that, your Honor, both question and answer.

THE COURT: You may not at this time.

Q Thereafter, Mrs. Faggen, did you receive any other increases in salary?

A Yes, I did.

Q And when did these increases occur, do you remember?

A At the beginning of each year when all the other

employees got their normal increases.

Q Do you recall at any time any conversations with Mr. Kaufman or Mr. Frank regarding the increase of your salary?

MR. POWERS: Objection, calling for hearsay testimony.

THE COURT: I am not sure of that, but, Mr. Cooper, I have been trying to make the point with your adversary that we are not going to get into every detail. We are trying this as if it is a suit for breach of contract for employment or for breach of fiduciary relationships to an employer. You, having made the objection, come back and seek to do the same thing that you would have this Court keep your adversary from doing.

MR. COOPER: Your Honor, I will make my position very brief and clear. I have no intention of pursuing collateral issues. However, when evidence is introduced and is admitted on what may or may not turn out to be a collateral issue, I would like to --

THE COURT: We are on, what is put in quotations, "cross examination" but I just think you are going way too far afield.

MR. COOPER: I have no further questions.

THE COURT: If it becomes so necessary to get

into this subject later, you will have your opportunity.

MR. COOPER: I have no further questions.

THE COURT: Thank you, Mrs. Faggen.

(Witness excused.)

MR. POWERS: My next witness, your Honor, is Mr. Theodore Ferrara.

THEODORE A. FERRARA, called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Ferrara, are you employed by the former Faggen Companies now?

A Yes, I am.

Q When did you start working for the Faggen Companies?

A I started in February of 1959.

Q Have you been there continuously since then?

A Continuously, yes.

Q What office do you hold?

A At the present time I'm executive vice president and chief actuary.

Q What office did you hold back in 1968?

A Chief actuary.

Q What were your duties as chief actuary?

A I was responsible for all the actuarial calculations performed in the office for all clients.

Q Did you have dealings with all clients?

A Some clients. No, I didn't have direct dealings with all clients, that's correct.

Q Did you have direct dealings with some of the clients?

A I did.

Q Did you do actuarial work for all of the clients?

A For all the clients I did the actuarial work, supervised it.

Q What is your educational background, Mr. Ferrara?

A I'm a graduate of Rutgers University, a member of the Society of Actuaries, American Academy of Actuaries, Conference of Actuaries and Public Practice.

Q Mr. Ferrara, I take you back to the period in or about September-October 1968 and I'd like to read to you a sentence: "Harold Faggen Associates, Inc., owns a number of pieces of IBM unit record equipment and leases an IBM 360 Model 20 computer. The present system uses cards. Two disc drives are on order and delivery is expected within the next few weeks."

Now, what was the kind of IBM unit record equipment which the Faggen Companies had in September-October of

1968?

A In September of 1968 we had an IBM Model 36020.

Q Could you describe what that means in terms of computers?

A Well, that is a small computer installation. We had no tapes or discs at the time. That's correct.

Q Did you have --

A Everything was done by cards to the machine.

Q Was that an up-to-date system in 1968?

A It was up-to-date for the type of operation it was performing, yes.

Q What kind of operation was it performing?

A It was performing small -- I would call it a small computer system. Very small computer system.

Q What client were you doing it for?

A Oh, we were doing it for all our actuarial calculations.

Q I see. Did you have a program for a completely automated union office then?

MR. COOPER: I'll object, your Honor.

THE COURT: Again, Mr. Powers --

MR. POWERS: I'm reading from the --

THE COURT: I know you are reading it but we are dealing with a gentleman who has a certain specific profession.

MR. POWERS: Forgive me. I think I can make it clear.

THE COURT: I think I know better and better what you are up to and I do not like it.

Mr. Ferrara, what responsibilities, if any, did you have for any kind of computer work going on in, let's say, 1968 up to October 9th of that year?

THE WITNESS: Well, insofar as I was responsible for the actuarial work, I would make sure that the computer did the job so I went to the computer and told it or told the people who were running it that I had to have this.

THE COURT: Yes.

THE WITNESS: So I in a sense was watching what they were doing, supervising and making sure it was done on time.

THE COURT: All right. Now, were there other persons who had a more direct relationship or concern with computing operations such as they may have been at that time?

THE WITNESS: There were people who actually did the computer work, yes, there were people in the computer department which did the actual programming and running of the installation.

THE COURT: I take it that there would of course have to be key punch people and there would have to be

supervisors and etc., etc., etc.

THE WITNESS: That's right.

THE COURT: You did not of course do any of that, given your profession.

THE WITNESS: That's correct.

THE COURT: But on the other hand, as you explained, in your professional field and as being the chief actuary of the companies, why, of course you had to use the computers.

THE WITNESS: And I reviewed a lot of work that was done. Most of the work I looked at before it was, you know, released to anybody. I would look at it to see if there were any corrections and I would tell them what has to be done.

THE COURT: Did you have any sales responsibility in the sense of trying to sell new actuarial business or perhaps new computing capability types of business?

THE WITNESS: No, I didn't.

THE COURT: I see. Now --

Q Could you summarize the nature of the computer capability of the Faggen Companies in September of '68?

MR. COOPER: I object.

THE COURT: I will allow it.

A I would say in September of 1968 our computer

capabilities were just what we were doing at the present time and we could not expand with the present facility and with the support we had to any larger field.

Q Did you have any computer personnel on staff?

A I meant personnel. With the present personnel.

Q What were the qualifications of the highest paid person you had in the computer department?

A Well, that person had been with the firm for eleven years and was operating strictly on that particular type of computer. So, therefore, he didn't have any experience at all with large computers.

Q Did he have any experience in programming a completely automated union office?

MR. COOPER: I will object to that.

THE COURT: Rephrase that, Mr. Powers.

Q Who was this individual you described?

A William Mosley.

Q He is the one on this list that I show you of $15 thousand a year? Do you recall what his salary was, by the way?

A No, I don't recall. It was about that, I think.

Q He was the one in charge of whatever computer work was done; is that right?

A That's correct.

Q Was William Mosley programming a completely automated union office?

MR. COOPER: Objected to.

Q At that time.

THE COURT: Well, I will allow it if you know.

A At the time we didn't have a completely automated union so he was not doing it for us. He may have been doing it somewhere else in the evenings but he certainly was not doing it for us.

Q Was he a part-time employee?

A No, he worked full-time.

Q Did he have another job?

A He did not, definitely.

Q Now, did you have a package of computer services available for sales to any customer in 1968?

MR. COOPER: I will object to that, your Honor.

THE COURT: Did you have any package what?

MR. POWERS: Let me rephrase it.

Q Did the Faggen Companies have any kind of computer program available for sale to customers to your knowledge in September of '68?

MR. COOPER: Objected to.

THE COURT: Overruled.

A To my knowledge, the Faggen Companies at that time

didn't have a program which could be sold for what I think you mean is small employers or for employers. That's correct.

Q Did they have one that they could sell to unions in existence at that time?

A They didn't have anything to sell to unions either, that is correct.

Q Did they have anything they could sell to stock brokers, accountants or lawyers in the computer field?

A They didn't.

Q Do you know of any negotiations for a substantial client to pay the development costs of the computer program at that time?

A I don't recall any. No, I don't.

Q I read you a sentence: "A very substantial client has already been obtained and we expect the fees from this client to be sufficient to pay all development costs."

Do you know of any client that that could be who had been obtained in September-October of '68?

MR. COOPER: Objected to.

THE COURT: Overruled.

A I don't know.

Q Now, I show you Exhibit 19 for identification and I ask you if you are familiar with the contents of that exhibit.

A Yes.

Q Was that prepared in the offices of what's now called Titan Actuarial?

A Yes.

Q Have you read through that document already?

A Yes, I have looked at it, yes.

Q Are you familiar with the list of clients that are shown on it?

A Yes, I am.

Q In connection with your work at the Faggen Companies in '66 and '67 and '68, did you do work for any of the clients listed on there?

A I would say I did work for almost all the clients on there.

Q Did you do work for the clients shown for '69, '70, '71 and '72 on that list as well?

A That's correct. Yes.

Q I ask you to take yourself back to -- strike that. Now Harold Faggen Associates, Inc., was the main corporation of the four Faggen Companies; isn't that right?

A Right.

Q And they carried the list of clients for the whole business, so to speak; is that correct?

A I don't understand the question.

Q Well, my question is really directed at, did the fiscal year for Harold Faggen Associates, to your knowledge, end June 30, '68?

A To my knowledge, it did, that's correct.

Q All right. I ask you to look at this --

MR. POWERS: I would like to offer in evidence 19, your Honor.

MR. COOPER: I'm going to object to it, your Honor. I would like to have -- my objection is it is not the best evidence of the clients. I would like to have the client ledger book here.

THE COURT: Before we get to that may I see it? Have you ever seen this before, Mr. Ferrara?

THE WITNESS: Yes, I have seen it before.

THE COURT: Where does this come from?

THE WITNESS: It was prepared in our office.

THE COURT: When?

THE WITNESS: I would say sometime in '73.

THE COURT: All right. Well, did you prepare it?

THE WITNESS: No, I didn't.

THE COURT: Well, I think on that basis I will not receive this.

MR. POWERS: I will reoffer it.

THE COURT: I gather what you want to do is ask

him his own knowledge, which you are entitled to do. So let's get to that rather than playing around with these recently made documents.

Q Were the Carpenters' Union last as a client in the year ended June 30, 1968?

MR. COOPER: I'm going to object to leading at this point, your Honor.

MR. POWERS: Let me rephrase it.

Q Were the Carpenters' Unions last as clients of the Faggen Companies before October of '68?

MR. COOPER: I object to leading, your Honor.

THE COURT: Well, I will allow it. Go ahead.

Q What's your answer, Mr. Ferrara.

A Yes.

Q Do you recall the billings for the Carpenter's Union?

A I think it was in the neighborhood of $75 thousand a year.

Q Do you --

THE COURT: When were they lost, as you put it? Do you remember about?

A I would say they were lost early in '68.

Q Were the Carpenters' Union a New York union?

A It was a group of unions in New York City, yes,

a district council.

Q Did the fact that they were a New York union have any significance to the Faggen Companies?

MR. COOPER: Objected to.

THE COURT: Mr. Powers, what difference does that make?

MR. POWERS: It makes --

THE COURT: The point is whether it was lost or not lost. Let's get ahead without all your highly subjective notions of what the facts are. Let's get to asking the witness what he lost and let's get it done with.

Q Mr. Ferrara, did the Faggen Companies have a strong emphasis in their client list on construction unions?

MR. COOPER: Objected to.

THE COURT: I will allow it. See what happens.

A Yes. Our biggest field was in the construction industry, yes, that's correct.

Q Did the loss of the Carpenters' Union have any effect on your status in the field?

MR. COOPER: Objected to.

THE COURT: I agree. Sustained. That sort of question, which is so iffy that -- and so cloud nineish, and it does not help Titan Group. Why you do things like this from your own naked self interest, I cannot understand.

Q I show you Exhibit 19 and ask you if you can tell the Court from your recollection, refreshing if you need to from the exhibit, what other unions were lost before October of 1968.

THE COURT: May I point out to you, Mr. Powers, that in law school you were taught, and it is still the law, that he has not said he had to have his recollection refreshed.

MR. POWERS: Question withdrawn.

Q Can you tell the Court what other unions were lost before 1968 that you can recall?

A Well, there were a number of funds which were lost when William Pearl's services were terminated.

Q Do you recall the names of these funds that were lost?

A Metro ILA Pension Fund.

THE COURT: What is that?

THE WITNESS: Metro ILA Pension Fund, Teamsters 806 Pension Fund.

Q Any others you recall?

A Prior to that particular date? I don't recall any others.

Q All right. If I showed you Exhibit 19, would it refresh your recollection on others for the fiscal year ended June 30, 1968?

A Yes, I recall these, yes.

Q Would you state to the Court what these funds were that were lost prior to June 30, 1968.

A Well, for fiscal year -- I see for June 30, '68, we did lost two Bartender Funds which were lost because of a merger into a larger union, we also lost some Hotel Restaurant Workers Local 164, Insurance and Pension Fund, which was out in the Island, and we lost an upstate Printers Pension Fund.

Q Do you see any others there that you lost that you haven't testified to that refreshes your recollection?

A Well, prior to -- in the prior fiscal year, I know there were some engineer -- Operating Engineers Local 137 Pension and Welfare Fund which we lost out in the Island, too.

Q Did you lose any of them in '66?

A I don't recall any in '66.

Q Would you like to refresh your recollection from looking at that exhibit?

A Well, there is a one here that I don't recall losing that fund. I don't recall that fund at all.

Q I show you the last page of Exhibit 3 in this trial called An Analysis of Clients. And I show you the total that is shown there; 143 clients. Did the Faggen

Companies have 143 clients in the fall of 1968?

A Based on this record, it did have it, if you --

MR. COOPER: I submit that is the answer, your Honor.

MR. POWERS: Your Honor, may the witness please be permitted to finish his answer.

THE COURT: Again, gentlemen, subside. Mr. Ferrara, what is your answer?

THE WITNESS: My answer is if you look at this in count A, client as an individual pension fund or an individual welfare fund, it would have 143 clients. But since most unions have pension and welfare funds, I would not say that they had that many clients but we had really somewhere in the neighborhood of half that number since some unions may have as many as three funds. But they are really the same client.

MR. COOPER: I move to strike that out, your Honor.

THE COURT: No, I won't strike it out.

Q Mr. Ferrara, when client relationship was terminated, did you just lose the pension fund of the client?

MR. COOPER: I object to the form of the question.

MR. POWERS: I would like to finish it.

THE COURT: I quite agree, Mr. Powers.

MR. POWERS: I had not quite finished the question.

THE COURT: You better start completely from scratch. I caution you from your own viewpoint, that is a ridiculous question.

Q When you lost the Carpenters as a client, how many funds did you lose? I show you Exhibit 19.

A Well, you lost two funds.

Q When you lost the Bartenders as a client, how many funds did you lose?

A Three clients.

Q When you lost the Local 164 as a client, how many did you lose?

A Two clients.

Q When you lost IUOE as a client, how many funds did you lose?

Q When we lost Local 137, Operating Engineers, we lost two clients.

Q Now, when you would lose a national client, did that sometimes mean that you would lose the local union as a client as well?

MR. COOPER: I object to the form of the question.

THE COURT: Yes, again, Mr. Powers, I will credit you for trying to expedite matters, but that could not be

possibly so unless you assume that all clients are exactly the same types of organizations.

Q Would you explain to the Court the basic nature of the clientelle of the Faggen Companies in '68, please?

A Our basic clientelle were union pension and welfare funds.

Q When you took on a union as a client, did it give you both the pension and the welfare fund to do actuarial work for?

MR. COOPER: I object to the form of the question.

Q In the normal general conduct of your business.

MR. COOPER: I object to the form of the question.

THE COURT: Overruled.

A Usually we did. I would say in seventy-five percent of the cases we had both the pension and the welfare fund whenever we picked up a new union.

Q When you picked up a new union, would you pick up the international or just the local in the general conduct of your business?

A Generally we just pick up the local.

Q Now, I take you back to 1968 and ask you if you recall dealing with the Mason Tenders as a client of the Faggen Companies in '68.

A Yes.

Q Would you describe to the Court your dealings with respect to Mason Tenders at that time? This is before October of 1968.

A At the time I was in charge of the actuarial work that was being performed for the Mason Tenders Pension and Welfare Funds.

Q Were the Mason Tenders ultimately lost as a client?

A Yes.

Q How big a client were they?

A I would say they probably were about $20 thousand per year.

Q Were they --

THE COURT: Ultimately lost. Permit me, Mr. Ferrara, what date did they leave your --

THE WITNESS: I would think they left about 1970.

Q Now, was there any investigation with respect to the Mason Tenders pending in 1968 that came to your knowledge?

MR. COOPER: Investigation of what?

Q The operations of that union.

MR. COOPER: I object to that, if your Honor please.

Q In connection with the Faggen Companies, of course. I'm not going into general operations.

THE COURT: You say of course. I am glad you see it as clearly as that. I do not understand this. Put it again so we have some reasonable basis of understanding you and Mr. Ferrara.

Q Did you acquire knowledge of an investigation by the Insurance Department of New York State of the services of the Faggen Companies as rendered to the Mason Tenders Union?

MR. COOPER: I object to the form of the question, your Honor.

THE COURT: Well, I am going to allow it because I do not think we can get it any better, but what has this got to do with our case?

Q What was the nature of that investigation?

A The Insurance Department was investigating some of the actuarial computations that were performed by our organizations for the Mason Tenders Pension Fund, Welfare Fund -- Welfare Fund. And also investigating some of the procedures about the services that we performed for the Mason Tenders, Pension and Welfare Funds.

Q Was there any discussion about potentially firing the Faggen Companies from that account?

MR. COOPER: I object to that.

THE COURT: Mr. Powers, may I suggest to you,

whether there was discussion or not, it did not happen until 1970. Mr. Ferrara has told us that.

MR. POWERS: Your Honor, my position is --

THE COURT: Your steady insistence is that every piece of dirty or potentially dirty linen that you can think of having to do with the Faggen Companies, you are going to air it in a federal law suit. I just do not think that is right.

MR. POWERS: Sir, the reason is, here is a list of new clients.

THE COURT: Oh, I know it.

MR. POWERS: I am trying to show there were several clients we had where there was a reasonable probability he would lose them and he did not disclose them.

THE COURT: That to me seems to be a standard that if you were ever required to live up to it you would have been gone long ago and so would all of us. You are straining to fire down a net with a 155 mm Howitzer. This is really just absurd.

In other words, you want to get out there was some investigation and therefore somebody should assume you lose the business.

MR. POWERS: No, I'm going to ask what this witness knows about the investigation and what, if any, problems were

brought to this witness' attention on the possibility of losing the business.

THE COURT: That is just a circumlocution on your part. Let me ask you, Mr. Ferrara, and I understand you object to this, counsel for Faggen, and I am going to strike it if it is what I think it may be, but would you enlighten me, Mr. Ferrara, was this investigation by the Insurance Department going on prior to, let us say, October 1, 1968, as you recall?

THE WITNESS: As I recall, it was, yes.

THE COURT: Did you and Harold Faggen ever have any conversations to the effect that you might lose the business as a result of this investigation prior to October 1st?

THE WITNESS: No, we didn't.

THE COURT: I am going to strike all of this as being totally irrelevant.

MR. POWERS: May I ask one more question, your Honor?

Q Did you have any discussions with any of the officers in the company on the possibility of losing the Mason Tenders account?

THE COURT: Overruled. It is stricken as being a red herring of the reddest kind.

Q What was the largest client that the Faggen Companies had before October of 1968 in terms of annual billings, single largest, if you recall?

A Single largest at that time? I would think would be the Carpenters.

Q Now, did you have any dealings with Local 1190, Drug and Hospital Workers Union in 1968?

A Yes, they were one of our clients.

Q Did you have any discussions with anybody in that union with respect to the quality of the services of the Faggen Companies?

A I had discussions with some of the leaders of that union about the services in the performance of Harold Faggen, yes.

Q What was the nature of the client relationship prior to October '68 with the Drug and Hospital Workers Union?

MR. COOPER: Objected to.

THE COURT: First of all, I am going to sustain that objection. However, let me ask you, Mr. Ferrara, did there come a time when this client was lost?

THE WITNESS: Oh, eventually it was, yes.

THE COURT: When was that, sir?

THE WITNESS: I think it was in 1971, sometime early '71.

THE COURT: Prior to October 9, 1971, do you recall any conversations with Harold Faggen in which either you or he suggested or raised the possibility that you might be in line to lose that particular client?

MR. COOPER: Does your Honor mean October 1, 1971?

THE COURT: I am sorry, October 9, '68, I beg your pardon.

THE WITNESS: No, I didn't have.

THE COURT: So we will go on to other greater things.

Q Was National Postal Union a client of the Faggen Companes in 1968?

A Yes, that's correct.

Q Were they ultimately lost?

A Yes.

Q Do you recall any conversation with respect to the client relationship with National Postal Union in '68?

MR. COOPER: Objected to.

THE COURT: With Harold Faggen, I will allow it.

MR. POWERS: Yes.

A There were discussions with Harold Faggen.

Q Will you state the discussions of those discussions.

THE COURT: We can go on forever. Lead in like

I did.

Q Did you have any discussions on whether you might lose the National Postal Union as a client or get less business from it?

A Yes.

MR. COOPER: Wait now. There are two questions.

Q Did you have any discussions on the question of whether you would lose any revenues from the National Postal Union?

A Yes.

Q What was the substance of that discussion?

A Well, prior to that time, prior to October of '68, the National Postal Union were making very serious discussions in relation to merging with the United Federation of Postal Clerks, which is a much larger union, and we felt that at the time there was a good chance that the merger would go through and we would lose this business.

Q How big a client was it, National Postal Union, in '68?

A I would say they were approximately $40 thousand a year.

Q Do you recall losing the Bartenders Union, two more Bartender Union Funds in 1969?

A That's correct, yes.

Q Do you recall any discussion with Harold Faggen on the subject of the Bartenders Union account in '68 or '67?

A Discussions?

Q Yes.

A Well, we had discussions about the account. We always discussed the accounts.

Q Was there any discussion on the possibility of losing the account between you and Harold Faggen?

A No.

Q Was there any discussion between you and anyone in the Bartenders Union on that subject?

MR. COOPER: Objected to.

THE COURT: Sustained.

Q Now, did you have any discussions -- strike that. Did you ultimately lose the Plumbers, 775, as an account?

MR. COOPER: Objected to.

THE COURT: Overruled.

Q Did you ultimately lose the Plumbers as an account?

A Yes.

Q When did you lose them?

A I would think sometime in '72.

Q Did you ever have any discussions with Harold

Faggen on the subject of potentially losing the Plumbers account?

A No.

Q I take you back to the spring of 1968. Do you remember attending a meeting where Harold Faggen was present and several of the consultants in the Faggen organization were present to discuss potential sale of the company?

A I recall a meeting. I don't recall whether it was spring of '68 or summer of '68. It was prior to October.

Q Was Harold Faggen at the meeting?

A Yes.

Q And he spoke at the meeting?

A Yes.

Q Who else was there?

A I think most of the employees of the company were there.

Q What was the substance of what was said at that meeting?

MR. COOPER: Objected to.

THE COURT: Again, certainly you cannot claim that this was all represented to one of these people purportedly acting for Titan. I do not understand.

MR. POWERS: If I can continue and describe what happened at the meeting. I think you will see the purpose of

the inquiry.

THE COURT: I am sure I will see the purpose but that does not mean I agree it is relevant.

MR. POWERS: If I can go with a couple of more questions on the subject.

Q Was there a moral problem in the Faggen Companies in the summer of '68?

MR. COOPER: Objected to.

THE COURT: Mr. Powers, really.

Q What did Mr. --

THE COURT: Have you ever been with any kind of an organization where somebody did not claim there was a morale problem? Really, this is 10(b)(5)? Honestly.

Q What did Mr. Faggen say at this meeting on the subject of potentially selling his company?

MR. COOPER: Objected to.

THE COURT: I am going to take an offer of proof in effect. Go ahead.

A The meeting was called because there were rumors that Mr. Faggen was going to sell the company and the meeting was held so that he could -- and he informed everybody that he would not sell the company, but before he would sell the company he would tell the employees first.

Q Did he tell the employees before he sold it to

Titan?

MR. COOPER: I will object to it.

THE COURT: Do you really want to pursue this kind of thing? This is embarrassing to you, I would think.

MR. POWERS: Your Honor, I feel that these facts are relevant. I would like to be --

THE COURT: Oh, you feel a lot is relevant. But fortunately so far we have not altered the rules of evidence to allow things in that Lawrence Powers thinks are relevant. We may come to that day, I admit, but we are not there yet. You do not claim that this is relevant to this case.

MR. POWERS: If I could continue, your Honor, and put in the next couple of factual links, I think the point will be clear. If you will permit me to, I will appreciate it.

THE COURT: Go ahead. It is fascinating that anybody would be as macabre as you are. I cannot resist listening just for that human reason. Go ahead.

Q Who called this meeting with Harold Faggen?

A I think it was Sol Tabor, one of the senior consultants.

Q Was Sol Tabor in charge of a lot of the clients of the Faggen Companies?

A He had a substantial number of accounts.

Q Was Sol Tabor the individual who left in the second week of December 1968 and took a group of clients with him?

A Yes, sir.

MR. COOPER: Your Honor, I hope you understand I have a continuing objection to this.

THE COURT: Oh, I do.

Q Did Mr. Faggen make any other statements at that meeting?

A I don't recall.

Q Did he promise any raises?

A I don't recall anything.

Q When did you first find out that the Faggen Companies had been sold?

A Sometime after October -- September of '68. I don't recall when exactly.

Q Did Mr. Faggen ever call you in before they were sold to tell you about the terms of sale or what arrangements were being made?

A I don't recall.

Q Do you know the reason why Sol Tabor quit?

MR. COOPER: Objected to.

THE COURT: Sustained. Look, I assume even you would understand the force of that objection.

Q I show you Exhibit 19, the second page of it, and ask you if that is a list of the clients that Sol Tabor took with him when he left December 16, 1968.

MR. COOPER: Your Honor, I just --

THE COURT: While you are looking at that, Mr. -- you go ahead and look at that, Mr. Ferrara. I am going to strike all of this business about the meeting that took place, as I am sure it did, as described by Mr. Ferrara and all of this business as to whether or not he was told that the Faggen Companies were going to be sold before contracts were signed or approved or negotiated or whatever.

If I may say so, Mr. Powers, I think it is more of a favor to Titan that that be stricken than it really is to the defense.

Q Mr. Ferrara, do you know if these are the clients taken by Mr. Tabor?

A Yes, they are the clients that were taken by Mr. Tabor.

MR. POWERS: Nothing further, Mr. Ferrara. Thank you.

THE COURT: Do you have any extensive cross examination?

MR. COOPER: It won't be extensive at all, Judge.

THE COURT: Well, it is five to one.

MR. COOPER: I think if I perhaps can be finished within ten minutes at the most.

THE COURT: Well --

MR. COOPER: Maybe even less than that, Judge.

THE COURT: Incidentally, Mr. Ferrara, may I ask you off the record a personal question?

THE WITNESS: Surely.

(Discussion off the record.)

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Ferrara, you were asked by Mr. Powers and shown a list of clients and you stated that the list shown was an accurate list as to the clients that were the Faggen Companies clients as of that date; is that correct?

A I didn't use the word "accurate."

Q Would you describe them as stating the number of clients?

A Based on my recollection, yes, that's correct.

Q And in preparation for trial, you checked the books of the Faggen Companies against that document and ascertained that that was the client list, right?

A No, I didn't.

Q So that all you are testifying to is from recollection?

A That's correct.

Q You mean --

A In other words, I worked on all of these clients. So I know they were lost.

Q I'm not talking about the lost clients, Mr. Ferrara. I'm talking about the list --

A That's what I'm talking about.

Q Wait just a minute. Maybe you don't understand.

Mr. Powers asked you, showing you this schedule, and referring to 143 clients and do you remember you answered that yes, that was a list of clients at that time, do you remember that?

A I don't think that was a list of clients. I said that is what this showed was a list of clients.

Q Yes, and you were asked whether that was the list of clients.

A This is a number. It doesn't say list. This is not a list. This is just a number. This exhibit only shows numbers, it doesn't list any clients at all.

Q Does it fairly reflect the number of clients; is that what you are trying to get at? In other words, it is the number, not the list; is that what you mean?

A I think if I recall, the questions didn't have to do with the list but it had to do with the number. Is this

the number of clients and I say it is according to how you define clients. I would say the number of clients were half of that number, approximately.

Q In your books of your corporation, you have clients by name?

A When you say my books, I don't have books.

Q When for the last time did you look at the client ledger of the Faggen Companies to determine the number of clients which the Faggen Companies had as of October 1, 1968?

A I didn't look at any list of clients that they had as of October 1, 1968. I didn't look at that.

Q When did you last ascertain the number of clients of the Faggen Companies prior to coming to court in connection with 1968?

A I never looked at the list of the clients.

Q Never?

A I never counted them up. I never had occasion to count them up.

Q So that you are not able to tell us whether the document accurately reflects the number of clients or not, are you?

A No, I'm not.

Q Pardon?

A No, I'm not.

Q You are not.

The last question, Mr. Ferrara, you were asked a whole series of questions, and I will try to expedite this, you were asked a whole series of questions by Mr. Powers with regard to the number of clients lost, both in the year '68 and subsequent; do you recall that?

A Yes.

Q Do you make any study to find out the number of clients gained?

A No, I didn't.

Q Mr. Powers didn't ask you to check along with the numbers lost to see how many new ones you got, did you?

A No.

Q Did you get any new clients, do you knew?

A A few new clients.

Q You got a few. How about the volume of business, did the volume of business go up after 1968?

A The volume of business?

Q Yes.

A What do you mean by the volume of business?

Q Well, you don't understand what I mean by the term "volume of business?"

A Volume means -- you know, it is according to what you mean by volume.

Q I'm talking about the gross revenues of the business, did it go up?

A I'm not sure.

Q Do you know whether the number of clients which Faggen Companies had were greater after 1968 than they were in 1968?

A Definitely lower.

Q Was that as a result of the Tabor defection, so to speak?

A Tabor and other defections, yes.

Q However, even with those defections, would it help you at all if I told you that the gross business went up after 1968?

A That the gross income went up?

Q Yes.

A Yes. I would believe that, yes.

Q You would. Okay.

MR. COOPER: I have no further questions.

THE COURT: Thank you, Mr. Ferrara. You may be excused, sir.

(Witness excused.)

THE COURT: 2:15, gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

MR. POWERS: My next witness, sir, is Joseph Levine.

J O S E P H L E V I N E, called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Levine, what position do you hold?

A I'm controller.

Q Of?

A Titan Actuarial Companies.

Q That's the present name of the Faggen Companies; is that right?

A Right.

THE COURT: What is that name again?

THE WITNESS: Titan Actuarial.

Q When did you start for the Faggen Companies?

A I was hired in November of '68.

Q Have you been there continuously since November of '68?

A Yes.

Q What was your position before you started with the Faggen Companies?

A I was employed by Joseph Warren and Company.

Q Did Joseph Warren and Company do the books of the Faggen Companies?

A Yes.

Q Did you work on the Faggen Books while you were working at Joseph Warren?

A Yes.

Q Who was in charge of the accounting functions at the Faggen Companies in 1968?

A Miss Dogan made the bills and kept the payroll records, did whatever billings, deposits, everything else.

Q What function did Harold Faggen fulfill in accounting?

A In accounting? I assumed he directed whatever Miss Faggen did.

MR. COOPER: I move to strike the last part.

THE COURT: I cannot hear the witness so I do not know what to strike.

Q Would you repeat your answer, please.

A The function at the time in '68?

Q Yes.

A I would assume Mrs. Dogan worked under his direction.

Q Try to keep your voice up.

Now, I show you Exhibit 19 for identification --

MR. COOPER: Your Honor, I move to strike the answer.

THE COURT: I must do that. I cannot ask you what you assume. We can only ask you what you know.

Q Did you know if anyone directed Mrs. Faggen at that time in connection with the accounting functions?

A No.

Q Mr. Levine, I show you Exhibit 19 for identification. Did you write that exhibit?

A Yes.

Q Is that in your handwriting?

A Yes.

Q What was the source of that, the information in that exhibit?

A That was taken from the accounts receivable ledgers of the company.

Q Does that represent a list taken directly from the accounting records of the Titan Actuarial and prior Faggen Companies?

A Yes.

Q Those books and records were available in their offices from 1968 down to the present date; is that correct?

A Yes.

MR. POWERS: I would like to reoffer this in evidence, your Honor.

THE COURT: When did you prepare that, do you know, Mr. Levine?

THE WITNESS: About three weeks ago.

THE COURT: All right.

Q Mr. Levine, I show you at the same time -- I'm going to ask yo have both of these offered -- an exhibit which we have marked 19A for identification, which is a typed document, and I ask you if the typed document was prepared from a summary which you prepared.

A Yes.

Q Does the typed document represent the year '66, '67 and the fiscal year ended June 30, '68?

A Yes.

Q Covering the lost clients that are on the hand-written list; is that right?

A Right.

MR. POWERS: May I now offer them both in evidence, your Honor, 19 and 19A.

MR. COOPER: Your Honor, I have an objection to the introduction of this exhibit. First of all, it contains material --

THE COURT: Which exhibit?

MR. COOPER: 19.

THE COURT: All right.

MR. COOPER: First of all, it contains material which occurred long after the acquisition; and secondly, I object to that portion of it which deals prior to the acquisition on the ground that it is irrelevant.

With respect to Exhibit 19A, the same objection, with respect to relevancy, your Honor.

THE COURT: It seems to me these duplicate one another.

MR. POWERS: They do, sir. I just provided a typed 19A so it would be a little easier for the Court to read. I didn't have a chance to type up the other one. Your Honor mentioned something about it being hard to read.

THE COURT: So all we have here in 19A is a sort of a half-baked or partial typing of what is 19 for identification; is that right?

MR. POWERS: Yes, that's the only difference between the two.

THE COURT: I must say, to put it kindly again, what in the world are we doing? This is just totally confusing.

MR. POWERS: Your Honor, this gentleman prepared it. I'm trying to supply something that is a little easier

for the Court to read. That's my only reason for putting in 19A. 19 covers the point completely but I had partially typed one and I supplied it. That's why I call it 19A instead of a new exhibit number. If your Honor doesn't want me to put in 19A, I will withdraw it.

THE COURT: It just seems to me anybody reading the cold record would think we were out of space somewhere.

MR. POWERS: Let me withdraw 19A.

THE COURT: I have no difficulty in reading it.

MR. POWERS: Then I withdraw 19A. Please strike 19A. It is not being offered. It is now withdrawn.

THE COURT: I certainly think it is totally irrelevant for what happened in the fiscal year ended June 30, 1966. It is totally irrelevant as to what happened in the end of the year ending 1967. I will allow the rest, but I must say --

MR. POWERS: Could I be heard on '66 and '7, sir?

THE COURT: No, I have heard you so often about these that I really don't think so.

MR. POWERS: If your Honor would like to look at the last page of Exhibit 3 in evidence, it has a breakdown for '67 and '66 for new clients and I'm trying to show he doesn't disclose ones that were lost. That's why I think the two preceding years are relevant.

THE COURT: I do not draw that inference at all. As a matter of fact, if you are recalling what Mr. Ferrara said, I think you are totally wrong.

You are showing me a so-called Exhibit B, which is part --

MR. POWERS: Exhibit 3.

THE COURT: No, no. I am reading.

MR. POWERS: Yes, the last page of Exhibit 3.

THE COURT: What is called Exhibit B on its face but is appended or a portion of what we know as Plaintiff's Exhibit 3, right?

MR. POWERS: Yes, sir.

THE COURT: Well, again, you are going into your favorite game of comparing apples and oranges. Exhibit B, this last page, purports to deal with an analysis of clients. And there is nothing on that that has to do with lost clients at all.

MR. POWERS: That's exactly my point. It is a material omission; to tell people about new clients and not tell them about the ones you lose is misleading.

THE COURT: Oh, I know that. You made your mind up on that long ago. But we are here to try that case out before somebody other than you, you see. I just do not buy that at all.

MR. POWERS: In addition, there's a reference to this schedule of clients in the memo itself, your Honor, which says, "Attached there are 143 clients, most of which have been clients continuously for more than ten years." And obviously I'm arguing that to make that statement along with the schedule and not tell the clients you lost in the preceding years is misleading under the law.

THE COURT: I must say I marvel at you. The ruling stands. I would be astonished if a firm like this did not lose some clients. But what happened in fiscal years ending the 30th of June, 1966, and June 30, 1967, is of such minimal value, even accepting your theory, that I am not going to pay any attention. Now, the rest of it I will receive for whatever it is worth and yet I point out to you and your client, Mr. Powers, that this is singularly unpersuasive for all kinds of practical reasons that ought to be obvious to anyone. But I will receive it over the objection of the defense.

xx (Plaintiff's Exhibit 19 received in evidence.)

THE COURT: Anything else you want from this witness?

MR. POWERS: Yes.

BY MR. POWERS:

Q When you were working for Joseph Warren and

Company, did you prepare the closing balance sheet of September 30, 1968, for the Faggen Companies?

A Yes.

Q Was that the balance sheet that was used for the closing of the transaction in issue in this case?

A I believe it was the balance sheet that was included in the contract.

THE COURT: How about the tax returns, by the by, did you prepare those?

THE WITNESS: Yes, I did.

THE COURT: What is the page reference, does anybody have that in the record? Page 211A?

MR. COOPER: 211A to 213A, your Honor.

THE COURT: Thank you.

Q I show you a copy of that balance sheet for the main company, Harold Faggen Associates. You prepared that; is that right?

A Yes.

Q What was the accounting basis on which that was prepared, was it cash or accrual?

A We tried to, based on the records we had, to get as close to an accrual basis as we could. So we went through the records and set up actual bills receivables based on the assumption that all the clients were on a fee basis, on a

continuing basis. We apportioned that portion of the fee that had been billed and that was for the period through September 30, '68, and included that as a receivable.

That was done at the suggestion of Mr. Faggen. The list I prepared setting up that schedule was reviewed by Mr. Faggen.

Q Now, did you discuss this accrual basis balance sheet with a man named Brandenberg at a later point from the Touche Ross firm?

A Yes. Not this one but the method that was used.

Q Do you recall that conversation? I show you Exhibit K for identification, showing your signature on a memo from Mr. Brandenberg. Do you recall the conversation on that subject with Brandenberg?

A Slightly, yes.

Q What was the substance of the conversation on the ability to show the Faggen books on an accrual basis for the years '68 back through '67, '66 and '65?

A Well, as I remember it, Mr. Hatcher had asked Mr. Brandenberg if he could set up an audit figures -- accrual basis figures for the -- those periods. Now, Mr. Brandenberg felt that to do that he would need these time and expense records and I told him I didn't know that any had ever existed.

Q Did you tell him that it was not necessary for an accrual basis presentation?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: Is there any reason why you insist on putting words in his mouth? Why don't you just ask him.

Q What did you say on that subject?

A We felt that that was the best possible and closest approximation we could get to an accrual basis because our expenses were more or less on a level -- were even, continuous throughout the year. There were no ups or peaks or valleys because of seasonal work as a rule, and that by trying to pull in the revenue for the period covered rather than when it was billed, we were trying to get as close to matching expenses and income as we could.

Q Were the revenues level, too?

A The revenues were level insofar as they were based on years or months continuously. They may not have been billed continuously throughout the year. For example, you could bill a client annually, but using the method we were using, we would pick up one-twelfth of the income each month to try to get the expenses and income matched.

Q Did you bill many clients on an annual retainer basis?

A The largest portion of the clients were billed on a monthly basis. There were clients billed on an annual and quarterly.

Q Did you discuss making up an accrual basis presentation of earnings for the Faggen Companies with Sosa at a later point?

A When Sosa came in, he asked how we were keeping our records. I familiarized him with what records we were keeping and the method I was using to pick up income.

Q Did you provide some of the materials that Sosa used in connection with his work?

A I provided a few schedules for him.

Q Did you discuss his work with him?

A To a certain extent, yes.

Q Now, in the group of accounts receivable which are included in the September 30, 1968, accrual, do those accounts receivable include any of the clients that were lost to Levin Townsend when Tabor went away in mid-December?

MR. COOPER: Objected.

THE COURT: What are you referring to? Are you referring to the September 30th --

MR. POWERS: '68 balance sheet which we started testifying on, your Honor.

THE COURT: And you want to know what about the

Levin Townsend-Tabor situation?

MR. POWERS: I want to know if any of the accounts receivable on that balance sheet represent taking accruals for accounts which were lost within a few months thereafter to Levin Townsend when Sol Tabor left.

THE COURT: You are referring to this item of 258,000 plus accounts receivable, right?

MR. POWERS: Right.

Q Did that involve using accrual concepts with respect to any of those clients?

MR. COOPER: That's what I'm objecting to, your Honor.

THE COURT: How can you charge this officer, since it only happened in September by everybody's admission? Somehow you are claiming that the seller should have represented that Tabor would skip off and take all this business to Levin Townsend; you cannot mean that.

MR. POWERS: I'm suggesting the seller should have indicated the lack of an employment agreement with Tabor and problems in dealing with Tabor which existed before the transaction took place.

THE COURT: Your theories of 10(b)(5) are going to dramatically change things around this building and elsewhere if they ever prevail.

Well, in order to get by with it, I will take this and see what happens. If you know, Mr. Levine, I assume probably it does include some of that.

THE WITNESS: I would assume so too. Since we treated all clients uniformally.

THE COURT: I do not see how we can miss it. So you can accept that as being the truth even without asking the question, Mr. Powers. What else?

MR. POWERS: Nothing further, your Honor, with this witness.

THE COURT: Any cross examination, Mr. Cooper?

MR. COOPER: Just a couple of points, your Honor, and I'll be finished.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Levine, last night before you left, I asked you if you would check the amounts received by Titan from the Faggen Companies. Do you remember that?

A Yes, I believe your associate pointed toward the 175,000 specifically. I looked that up.

Q Yes, there was an item on the sheet of 175 -- I will show you the sheet now -- this was --

THE COURT: What exhibit is this?

MR. COOPER: It is not marked yet, your Honor.

THE COURT: May I suggest we mark it.

MR. COOPER: May we have it marked for identification.

xx (Defendant's Exhibit L marked for identification.)

Q Mr. Levine, was this paper prepared by you?

A Yes.

Q It is in your handwriting?

A Yes.

MR. COOPER: I offer it in evidence.

MR. POWERS: What is it? Can you identify it? No objection. May I add, your Honor, the reason I'm not objecting because it is a stipulated fact.

THE COURT: If you do not object, do not belabor the point.

xx (Defendant's Exhibit L received in evidence.)

THE COURT: If I read this correctly, Mr. Levine, what this generally speaking is, you drew down from some books and records the cash transfers from the Faggen Companies to the Titan Group for a period commencing after the merger and up through the year 1970?

THE WITNESS: That's right.

Q Do you recall, Mr. Levine, that last night before you left, and having heard the testimony of Mr. Williams, I

believe, in connection with the transfer of $173 thousand of treasury bills, I had inquired of you to check whether the cash of $173 thousand in April of 1969 represented additional cash paid.'

A The monies that were received in April that we transferred represented by this $175 thousand was $50 thousand of treasury bills -- notes rather, that had matured in April, plus $125 thousand that we had received in the Levin Townsend settlement.

Q So that are you saying that the Levin Townsend case was settled in April of 1969?

A From what I can see, yes. I received $125 thousand.

Q In addition to that, Mr. Levine, the receipted treasury bills -- you have gone over this schedule, have you not? This was the receipt --

A This schedule was prepared by me so that they could -- so that Titan and Mr. Faggen and Miss Dogan could go to the vault and transfer the securities.

Q Specifically, what we are talking about, your Honor, is the schedule of securities transferred, which is the part appended to the appendix.

What I draw your attention to, Mr. Levine, when the treasury bills referred to were received by Mr. Russo, was physical possession taken of that by Mr. Russo?

A Mr. Russo didn't receive the treasury bills.

Q You see. the signature by Mr. Russo? And I draw your attention -- first let me ask you this: I draw your attention to the document itself.

A Yes.

Q All right. Now, the document itself has a receipt by Mr. Russo of all of the securities listed, does it not?

A Yes.

Q Are you saying now that notwithstanding the receipt, Mr. Russo didn't pick up the items set forth on this receipt?

A To the best of my knowledge, the monies that were received, when these treasury notes were matured, were received by Harold Faggen Associates and the other companies, and deposited. I would assume that either Mr. Russo deposited them with the bank for collection or turned them in when they were matured. I know we received -- I know we received the proceeds.

Q Meaning the Faggen Companies?

A Right.

Q With respect to the amounts of money on the valuation of the securities, which has been offered in evidence as the Peat, Marwick exhibit -- it is Exhibit J; I have

a copy here of a balance sheet of the Faggen divisions -- do you know who prepared that?

A No.

Q Is any of your handwriting on it?

A No.

MR. POWERS: Is that Exhibit J you are handing the witness or is it something else?

MR. COOPER: It is similar to Exhibit J dealing with the specific items.

MR. POWERS: Then I object.

MR. COOPER: Does your Honor have Exhibit J?

THE COURT: I do.

Q Mr. Levine, did you work on the valuation of the securities that was used in the preparation of the balance sheet?

A No, the actual market values were computed either by somebody at Titan's office or somebody at the -- it was not prepared by me, that I know.

Q Did you ever see that document before today?

A Yes, I received a copy of this sometime in early '69; from the controllers of Titan.

Q Did anybody ever raise any question with respect to the valuation of the securities shown on it?

A No.

Q Lastly, Mr. Levine, with respect to the questions that were asked of you by Mr. Powers, a little while ago, dealing with clients lost, did anyone ever instruct you by either Mr. Powers or anyone else in the accounting department of Titan to check on the number of new clients gained in the years in question?

A Not that I remember.

Q Did the Faggen Companies acquire new clients during those years?

A There were some acquired during those years.

Q Like any other business, there were clients gained, clients lost; isn't that so?

A Yes.

Q And you had a book which showed the list of clients?

A We maintained an accounts receivable ledger by client.

Q And you saw -- you heard earlier today when Mr. Ferrara was testifying he was shown an exhibit which showed the number of clients listed, 143?

A Yes.

Q Did you ever see such a book containing such a list of clients?

A As I said before, there's accounts receivable

ledger by clients, a separate page for each client.

Q Did you go over the list of clients to check against Mr. Faggen's figures to see whether --

A No.

Q You didn't do that?

A No.

Q Nobody asked you to do that?

A No.

MR. COOPER: No further questions.

MR. POWERS: Thank you.

(Witness excused.)

MR. POWERS: The next witness is Mr. Basil Castrovinci.

B A S I L C A S T R O V I N C I , called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

Q Mr. Castrovinci, when did you start working for the Faggen Companies?

A October 1968.

Q Are you still working for those companies?

A Yes.

Q What is your position there now?

A I'm president of Titan Actuarial Services, Inc.

Q What was your initial position?

A I was officially hired to be an assistant to Ted Ferrara, who was the chief actuary.

Q What is your educational background, Mr. Castrovinci?

A I have a Bachelor of Science in Mathematics from St. Peter's College, and I'm a member of the American Academy of Actuaries.

Q What other positions have you held in the actuarial field?

A Well, when I first started in the actuarial field, I was -- I worked for Metropolitan Life Insurance Company in a specialized actuarial student program which I have a data processing background also in addition to the actuarial background.

Q What data processing training have you had?

A Well, they sent us to classes and so on on the various computers. At that time it was second generation computers. When I worked for Alexander and Alexander, I also installed a computer in their New York office for their actuarial division.

Q Who is Alexander and Alexander?

A Probably one of the top five, I guess, brokerage houses in America which has a substantial actuarial division

which handles mainly corporate pension plans.

Q When you started with the Faggen Companies, what computer capabilities did they have?

A You mean personnel or hardware, both?

Q Start with hardware.

A They had --

MR. COOPER: Your Honor, I'm going to make the same kind of objection.

THE COURT: And I am going to make the same ruling. In other words, I am going to permit this and see what happens. Go ahead.

A They had a 360/20; it was a card system. I would not consider -- I would not call it capabilities, I would just say they had a small computer that services mainly their actuarial accounts, that do the actuarial valuations.

Q Were they capable of doing any data processing with that equipment?

A Well, I assume what you mean is commercial data processing?

Q Yes.

A Not in my estimation, no.

Q Would you explain to the Court the distinction between doing actuarial work on a computer and doing data processing.

A Yes. The actuarial work is probably closer to scientific application so that necessarily the languages that are used, personnel that is required, both backgrounds have to be different than, say, a commercial processing where it is basically adding A and B equals C and print it out. While in the actuarial application it is more a question of applying complex formulas and using the computer to find out the mathematical work for the -- it is a different kind of animal that you need to program and you need different systems and lists and so on. And the hardware usually is different.

Q Now, does data processing require memory core equipment?

A Sure.

MR. COOPER: I'll object to leading, if your Honor please.

THE COURT: Well, if this is leading it certainly is not very harmful. Go ahead.

Q Would you explain what memory core equipment is.

A Well, all computers have memory core. It varies and depending on the size. I mean, of the computer.

Q How much memory core capacity did the equipment at the Faggen Companies have in October '68?

A I don't recall exactly. For some reason 24-K

jumps in my head but I don't know if that was it.

Q How does that rank in terms of being able --

A I think I said it was a small computer, there was no question about that.

Q Did they have tapes and disc-drive capacities?

A No, I think there was one on order. I think probably whether they had one on order or not, that is not too much of a problem. I think hardware, if you have the cash, you can come up eventually with the equipment. You need the personnel to utilize it.

Q What kind of personnel did the Faggen Companies have in October '68?

A What kind?

Q Capacity.

A Data processing?

Q Yes.

A They had, I think it was mentioned earlier, Bill Mosley, who was a programmer, but they also had another programmer and that was about it as far as from the software end of it, of actually being able to utilize the machine. Those are probably the two people they had. It was a two-man operation. Those two people were not -- except one, the languages today that are being used and used then, they were not sophisticated in the use of them except for the BAL,

which was a question in my estimation, like I said earlier, I just don't think they had the personnel capabilities.

Q Were they doing any data processing as such in '68 when you joined it?

A Somewhat, yes.

Q Did they have a completely automated program for a union office?

A If they did, I was not aware of it.

Q Did they have any kind of computer program package for sale to anyone?

MR. COOPER: I'll object to that, if your Honor please.

THE COURT: I will overrule that objection.

A Would you read that back?

Q Did they have any computer program package available for sale to customers in October of '68?

A We had valuation programs. If you can find someone who would buy it, you could sell it.

Q That's in the actuarial field?

A I'm sure you had ancillary programs, too. If you could find a program, they would buy it.

Q Did they have a program for a completely automated union office?

A No, not to my knowledge.

Q Did they have any program for completely automated pension plan calculations for small and medium sized employers?

A No.

Q Do you know if they were providing any services to stock brokers, accountants or lawyers in October of '68?

A In connection with the package program for small employers?

Q Yes.

A No, not to my knowledge.

Q Did they have any package pension plan services available for sale at very reasonable prices in October of '68?

A In October of '68 I was not aware of what prices were being offered or what was being sold. It is only retrospectively now that I'm aware of what the pricing structure was but at that time obviously I didn't know.

Q My question was really two-fold: Did they have any package pension plan services available for sale in October '68?

A No.

Q Did you know of any pricing discussions with any of their customers at that time when you went to work?

A No, I wouldn't have been in a position to know

whether there had been or not.

Q Do you recall a conversation with Harold Faggen in the summer of 1969 about computer programming in the company?

A Yes. I do.

Q Did Harold Faggen call you?

A Yes.

Q What did he say to you in that conversation?

MR. COOPER: I'll object to that issue, if your Honor please.

THE COURT: I will take it subject to connection. Let's see what happens.

A I recall it was either the end of July or the first week in August. I was home, I was on vacation, Harold called me up and inquired if I was sick, I told him no. He said he would like to speak to me. Would I come back to the office? I don't recall if I went in the next day but I recall going back shortly thereafter.

We discussed developing a program for small employers; where all the actuarial calculations would be done, and so that a package would be developed and that you'd be able to go to small employers and sell it to them and so we'd have the capabilities in house of doing it cheaply, quickly and so on by machine.

Q Is that the first time you ever discussed with Faggen preparing such a program?

A I really don't remember that. It may have been kind of in passing conversation. That was a first serious attempt that I can think -- that I remember.

Q Do you know of any such program that was in existence before that conversation in the summer of 1969; in the Faggen Companies?

A I don't think so. I don't think there was a program. No, I think that would be foolish. You know, I wouldn't have done it if there was one.

Q Did you develop a program at that time?

A Yes. I spent -- I don't know how long, maybe three weeks, four weeks, maybe longer and I wrote this program. Well, the specifics for it. And then I worked with the then data processing manager, who had FORTRAN background. He then took my specification, wrote the program from that, I checked it out, ran examples and so on. I really don't know how long took. Maybe six weeks. But it was developed at that

Was it ever used?

l, the first time I ran it, I ran it a lot for purposes. People came around, you know, I ran

-t used, you mean, actually sold and then put into

operation?

Q Yes.

A There may have been one time that it was used. Yes.

Q Now you said --

A A couple of times maybe.

Q You said it was used for demonstration purposes. Was Mr. Faggen ever present at one of those demonstrations?

A Sure. I demonstrated to him myself.

Q Did you ever participate in a demonstration before Ben Weinstein, the treasurer of Titan Group?

A Ben's the only one from Titan that I recall doing it for. I know there were other people from Titan who came around occasionally and Ben was, for some reason -- took an interest in it. I kind of remember that name.

Q Was Mr. Faggen present at that demonstration?

A I couldn't tell you with certainty. I'm fairly sure he was.

Q Can you fix a date for that?

A It had to be after August. No, I couldn't.

Q What did Faggen do at that demonstration?

A He watched, like everybody else, you know, I guess.

Q Did he say anything about the program?

A To me?

Q No; to Mr. Weinstein that you heard.

A I think he would just explain it as best as he could.

Q Now, what do you recall about the pricing structure of services on the computers that you were providing in the Faggen Companies once you started there? Do you have any recollection of price structure?

A No, I think I said earlier that I had no idea. Only retrospectively now.

Q Did you ever lose any clients because of the price charged?

MR. COOPER: I object to that.

THE COURT: First of all, I do not know whether this witness has any knowledge of such things.

Q Did you subsequently acquire knowledge of the pricing structure of computer services that were sold by the Faggen Companies?

A Sure.

Q When did you acquire that knowledge?

A Well, by force in June of '72 when I became president; by curiosity before that sometimes.

THE COURT: Would you like him to testify now about pricing in '72 on?

MR. POWERS: I'm asking what he knows about prices

previously but he acquired the knowledge in '72. I'm asking what he knows about '68 pricing, if anything. Knowledge that he got later, your Honor.

THE COURT: Well --

THE WITNESS: Is there a question unanswered?

THE COURT: I am having trouble. Excuse me, Mr. Witness, but I am having trouble even imagining.

You want to know the pricing of what?

MR. POWERS: Computer services as rendered by the Faggen Companies in '68.

THE COURT: And if we get the answer, what does that do for your side of this lawsuit?

MR. POWERS: There is a statement here that, in this memo, "The availability of package pension plan services at very reasonable prices will enable," and it goes on. I'm about, I hope, to elicit from this witness that, in fact, the services that were sold were at high prices. In '68 and '69, clients complained and caused a diminution in overall revenues lost to the company because of their ability to render stuff at moderate prices.

THE COURT: I am surely aware of your ultimate conclusions in this case, that I did not need, but let's go back.

Mr. Castrovinci, did you have any contemporaneous

information in October 1968 respecting any kind of pricing for computer services which I gather were not very great or very sophisticated?

THE WITNESS: I had no knowledge at all of any pricing at all at that time.

THE COURT: Did there come a time where you saw some kind of records way back or rather way later in '72 when you became president of one of these companies?

THE WITNESS: Yes.

THE COURT: You saw it. What kind of prices were those, prices for data processing?

THE WITNESS: Right.

THE COURT: Prices for actuarial services, what?

THE WITNESS: We had basically at that point, when I became president, we had developed into really two major divisions, data processing division and an actuarial division. The data processing division was having serious problems. There was a tremendous cash drain, a tremendous drain on the total company. So it required my going into it to find out what the problem was.

THE COURT: So that you went back to check figures for pricing of data processing?

THE WITNESS: Yes. Whether they underbid, overbid, what was the problem? Were we paying too much for the

people we had? What semed to be the problem. Were the official bids right or wrong? That's why it is retrospective.

THE COURT: What did you find out at that time?

THE WITNESS: First of all, the contention was brought to me by the data processing people that they felt that all the bids were way too low, that we couldn't provide -- possibly provide the service on a going basis on a profitable basis at the official --

THE COURT: When you say the bids, I do not follow you.

THE WITNESS: Well, in a sense, that --

THE COURT: You mean the Faggen Companies priced their jobs too cheap?

THE WITNESS: Right, too cheap. So had to find out whether it was the data processing, because the data processing people at that point then wanted to take it to the clients and increase their fees. Now, because of the relationship between the actuarial and the data processing, we may have the same client for which we are providing both data processing and actuarial and I didn't want the actuarial end of it to be affected, because one client may be paying us 70 thousand for data processing and 40 thousand for actuarial and before they went in and asked for a ten percent increase, they would have to clear it so we would have to get it

resolved, what the problem was.

THE COURT: Understandably so. So that is it fair to say that your investigations, whatever they were, tended to corroborate that maybe back in '67 and '68, for example, the Faggen Companies priced their data processing work a little on the cheap side?

THE WITNESS: Yes.

THE COURT: They did?

THE WITNESS: Yes. That was one of the problems, yes.

THE COURT: All right. Is that what you are seeking, Mr. Powers?

BY MR. POWERS:

Q What are the other problems?

THE COURT: No, wait a minute. Please, Mr. Powers. Honestly, if you ask me what my problems were or Mr. Frankel what his problems are, we would go on forever. Now, come on, please.

MR. POWERS: I'm picking up the tail end. Your Honor asked all the questions I wanted to ask him.

THE COURT: If you ask an American citizen his problems we would be here for the rest of the year, you know that.

MR. POWERS: Your Honor asked all of my questions

on that subject and I'm through with that issue.

THE COURT: Let's do something a little better than that last question, if you don't mind.

Q I show you Exhibit 8A for identification, and ask you to describe to the Court on this exhibit on the actual operating volume of the Faggen Companies from '69 for the breakdown between actuarial services and computer services to the extent you can recall it.

MR. COOPER: I'm going to object to this, your Honor, this is not the best evidence of what those records show.

THE COURT: Well, you may be right but since I do not know what we are looking at and since I do not really understand what this is all about, I cannot rule on it.

MR. POWERS: These are those actual earning and volume figures. If you recall this morning I said to your Honor --

THE COURT: Oh, this is Plaintiff's 8.

MR. POWERS: Right. They contain a composite of two kinds of revenues.

THE COURT: These are not official documents, I quite agree, Mr. Cooper, but that is besides the point. This is a litigation inspired analysis. That is what this is, as the witness this morning who identified it said.

Q Would you further analyze for the Court the basic breakdown between computer and actuarial work in those revenues for each of the years, to the extent that you can recall.

A Can I assume these numbers are correct?

Q Those were prepared by Mr. Williams.

A That doesn't answer my question.

THE COURT: Touché, Mr. Castrovinci. Would you please help him out, Mr. Powers? How can you ask him to do that?

Q Do you have any notes with you on the breakdown between computer and actuarial revenues for those years?

A Would you like -- I could give you a general breakdown of what the approximate volume was between the data processing --

Q Fine.

A I would say from my memory, I have notes if you want exact numbers, I think I can dig them up, but I would say in '69 it represented about in the area of slightly $100 thousand in '70.

Q What was slightly under 100 thousand?

A The income attributable to data processing. Pure data processing, as opposed to in house charges for actuarial valuations. Okay?

Q When you use the word "income," do you mean gross revenues or net income?

A I mean gross revenues.

Q All right. How much was it for 1970, roughly?

A I'd say in '70 at that point it jumped to about a quarter of a million dollars. It stayed at that level for another year and it went up to 485, hovered around 500 thousand. In that area. So I would say what was happening was the data processing was taking over a larger and larger portion of the total volume of business. Percentage wise, it got to the point where it was probably thirty, forty percent of the total volume of the company.

Q What was happening to the actuarial business during this period in terms of volume?

A Dollar volume?

Q Yes, first.

A Well, in '69 we lost over $100 thousand just in clients, just to Levin Townsend, so there was some shrinkage there. Let me put it this way. A unique thing happened, we lost maybe forty clients whose total billing may have amounted to $300 thousand or maybe under $300 thousand, maybe 250, and they were replaced instantly by one client whose volume exceeded that. So volume, you may not see any substantial change dollarwise doing across the board, the actuarial volume,

it probably stayed about the same.

Q What happened the following year, actuarial volume as contrasted with data processing volume?

A It started shifting, obviously, in '68, '69, during that period. There was a shift. The total volume of the company was shifting more -- was being placed on data processing. It took more and more of a percentage of the total volume where pre-'68 they may have amounted to less than ten percent, it just started building up. Exact numbers I don't have.

Q Do you have any notes with you on volume numbers?

A Total volumes? I have got some notes that will tell you the data processing numbers.

Q I'm particularly interested, before we leave volume, in what you recall about earnings for each category of business the firm was doing from this period forward.

A Again, this is knowledge only retrospectively that I picked up later by going through all of this. Actually, I don't know about the '68, '69 period except in my notes, but it became an acute problem during '70, '71, at that point.

Q When you say an acute problem, in what sense?

A Well, in what sense? It was strangling the business from two points of view, from a monetary point of

view, and secondly from the animosity I felt it created with our actuarial clients because if you screw up their data processing records they are going to figure, well, you are not a good actuarial.

Q You used the word "it" in the beginning of your answer. What were you referring to when you said "it?" Was it the computer services?

A The computer services, you know.

Q All right. Now, would you like to refresh your recollection from your specific notes? I will get them for you if they are here in the courtroom.

A They are in my bag. All I have with me is what the data processing -- another reason, your Honor, I made an analysis was because we sold the division recently. Data processing division.

THE COURT: Did you?

THE WITNESS: Yes.

THE COURT: So that Titan Actuarial is literally that and no more?

THE WITNESS: Yes, so it was necessary for me to pull the facts together on what occurred.

Q Would it be fair to generalize on the total history of data processing that it was a continuing and accelerating loss throughout?

MR. COOPER: Your Honor, I have remained silent through this questioning. I don't know what the relevance is any longer. We are discussing matters three and four years after acquisition.

THE COURT: Oh, yes. I do not know why you are objecting. I should think you would like to have some of this out on the record.

So that we are not losing time, Mr. Powers, that is too broad. Also, if I understood Mr. Castrovinci, his answers do not accord with the assumption obviously built into your last question.

MR. POWERS: I have forgotten my last question.

THE COURT: Unfortunately, you were trying to give us a sweeping testimonial view of what happened here and I am afraid that is part of the problem.

MR. POWERS: Let me withdraw the question.

THE COURT: I think you better start over again.

Q Could you tell the Court what happened in terms of earnings with respect to the Faggen Companies giving a breakdown between actuarial business and computer business.

THE COURT: He has just done that in part but now you have given him his notes. Is there something specific?

Q Yes. Would you look at your notes and give the figures to the Court, please.

A Well, I have here, which I thought you were asking about, what was the performance of the data processing division from '68 on. That's what I thought you were asking for.

Q Go ahead and tell us.

A Okay. Now, I will just preface it with one remark and that is that it is very difficult when you have one division that is really - should be really probably two divisions to be able to make a definitive split between them because there are such things as administrative services which overlap, overhead and so on, so something has to be done on the bottom line; but what I have here in my notes are basically what were data processing fees and what were the losses for each of the years.

Now, in '68 it was $75 thousand; '69 it was --

THE COURT: Wait a minute. I am really confused now. I had thought that this was gross income you were giving us, but --

MR. POWERS: I made a distinction in gross revenues.

THE COURT: I am not interested in hearing your views. I am questioning the witness, please. Let me go back, Mr. Castrovinci.

THE WITNESS: Right.

THE COURT: You just gave a figure of $75 thousand; is that gross income or --

THE WITNESS: No, that --

THE COURT: Is that a loss figure?

THE WITNESS: Yes, that was -- I thought the question was --

THE COURT: It may have been.

THE WITNESS: The bottom line on the data processing division, what did it actually do for each of the years from '68 on.

THE COURT: But I would like to know whether we are giving gross -- I have enough trouble with the lawyers in this case who confuse me mightily, and I admit that I may have gotten this wrong and through no fault of yours, but in 1968 you just gave a figure of 75 thousand.

THE WITNESS: 75 thousand.

THE COURT: What is that?

THE WITNESS: That is the loss that the data processing division incurred before actuarial allocation, in other words, for providing in-house services for another division and also before allocation of administrative services which meant supervision, the president's time, the chairman's time and whatever.

Q Would you give the same figure to the Court for

the next year?

A For '69 it was 138 thousand even.

THE COURT: Lost?

THE WITNESS: No, -- lost, right. These are all losses.

THE COURT: Okay.

THE WITNESS: 1970, it is approximately 234 thousand, 1971, it was 192 thousand.

THE COURT: Wait a minute now. Wait a minute. A hundred what?

THE WITNESS: 192 thousand.

THE COURT: Again lost?

THE WITNESS: Right.

THE COURT: 1972, 173 thousand rounded.

Q Who was in charge of the Faggen operations during the period for which you just read figures?

THE COURT: Of the Faggen operations?

Q Who was in charge of the Faggen Companies during this period?

A Well, I was in charge of the Faggen Companies for -- from June of '72 on and prior to that it was Harold Faggen and Rose.

Q What was happening to the actuarial business during this period?

A Well, could you be more specific?

Q Was the actuarial business staying at a level or was it shrinking or was it getting larger?

A Again, volume, number of clients? By volume, I think I have already testified that this one major client made up for a great portion of the volume, however, there was shrinking in the amount of clients that we had.

Q Was the profit from the actuarial business effectively carrying the overall operations from this period?

A That was common knowledge, I think, even down to the porter in the company. I think everyone was aware of that in the company.

THE COURT: Mr. Castrovinci, I am sorry, but I am totally puzzled. I took what I thought were careful notes of your testimony before you got your numbers.

THE WITNESS: Right.

THE COURT: According to what I understood you to say, in 1970, for example, the data processing operation grossed $250 thousand. About the same amount in 1971 and thereafter the gross jumped. So that it was producing in those years a greater proportional share of the total gross of the Faggen Companies than theretofore. I think you said something up to thirty to forty percent.

THE WITNESS: Right.

THE COURT: As opposed to pre-October 1968, for example, when it was only throwing off about ten percent of the business?

THE WITNESS: Right.

THE COURT: Gross. Is that fair?

THE WITNESS: When I use gross, I really mean it as volume. Am I misusing that word?

THE COURT: All right. I do not accuse you of misusing anything. My confusion is mighty and I just want to make sure I got this right.

So that when I said a few moments ago $250 thousand, that should be understood as volume, right?

THE WITNESS: Right.

THE COURT: So by that you mean fees compensation gross?

THE WITNESS: Right.

THE COURT: All right. Now, am I also right in understanding that as time went along up through 1969 up through 1972, let us say, that the actuarial business gradually came to represent lesser percentile of the total gross volume than it had when you first arrived say in '68?

THE WITNESS: Right.

THE COURT: And if I also understand your testimony, though it is true in this period of time, those years,

you lost about forty clients, it did not have any great impact upon the gross or the volume, to use your word, partly because you picked up one new client which practically absorbed or virtually came close to absorbing the loss of billings or volume which went out with the forty?

THE WITNESS: Yes.

THE COURT: Anything else, sir?

Q When you started with the Faggen Companes in '68, were there new pension and welfare funds coming into being at the time which became available as clients to the Faggen Companies?

A Were there new --

Q Let me rephrase the question.

Did you have any feel for the overall makeup of the pension and welfare fund industry as a source of business in 1968?

MR. COOPER: I object to the form of the question.

THE COURT: I do not blame you. Try again, Mr. Powers.

Q Do you have any knowledge of the overall numbers of pension and welfare clients available as a pool of business for the Faggen Companies in '68?

A I don't think anybody in this courtroom does.

THE COURT: Wait a minute. You object to this,

Mr. Cooper?

MR. COOPER: I do, yes, your Honor.

THE COURT: I sustain that objection because as I understand it, you are asking Mr. Castrovinci to tell us whether or not there is a whole host of clients out there in the wide, cruel world which, according to you at least, should have been snapped up by the Faggen Companies rather than any competitors. How can he answer such a question?

MR. POWERS: Let me ask another question.

Q Was performing actuarial services for pension and welfare funds a growth industry in '68?

MR. COOPER: Objection, your Honor.

THE COURT: I will allow whether or not he considered it to be such.

A I still think it is. I don't think it has ever been anything but a growth industry.

Q Mr. Castrovinci, I show you a letter, 16 for identification. Did you send that letter to Mr. Sosa?

A Yes.

Q Do you recall the conversation on that subject?

A Yes. --

MR. COOPER: Wait. The answer is just yes or no, I understand.

Q Did you send that letter?

A I said yes.

Q Could you explain to the Court in what connection you were asked to send that letter?

MR. COOPER: I will object to that.

THE COURT: I am going to take this because I cannot yet understand why Mr. Powers representing the client he does wants to put that in evidence, so I have got to give him a chance even though it may end up to be like pointing a gun at one's self and pulling the trigger. Could you explain to me?

THE WITNESS: Sure. What happened around, I guess it was around August of '72, when Bill Sosa was in our office working for several weeks, I guess, and an occasion -- I had occasion to talk to him and he said the pension plan gave him great promise. He was trying to reconstruct the income of the company for a certain period. And he would like to know -- like to discuss the pension plan. So we sat down and discussed the pension plan, what was bothering him about it. Was it overfunded, was it not overfunded, and so I recall on numerous occasions trying to explain to him the concepts of overfunded, underfunded and so on.

He then came back with a request that would it be possible to value the pension plan, do an evaluation as of December '68, I guess it was, or June '68, and determine

what the cost, the true cost, as an actuary, what would the true cost of the pension plan be for that period. I told him yes, it was possible. We had all the records and so on. And he said could you do it because it is important and we need it? I said we could but it would take six weeks. I got the impression it was not that important, and I couldn't see expending six weeks energy on something like that. So he then asked again would I be able to ballpark it and I said well, I can give you a ballpark number. So he said okay, that would be fine. I went over the records personally myself, looked at it because it is a small pension fund, we didn't have that many employees, discussed it with Ted, who is the chief actuary, in detail, and both Ted and I -- there were some problems with the detail of the reconstructing of the valuation, and we came up with a ballpark number, which was that we felt that the cost of the plan would be between 15 and $30 thousand per year on an ongoing basis.

Q When you say "on an ongoing basis," doesn't that mean each year after '68?

A That's right. If all our assumptions were to be true, let's say the number was inbetween fifteen and thirty, or say it was fifteen, and if all our assumptions came true as far as the growth of the fund, number of turnover or whatever we did assume in that valuation, that should have been

the cost each year.

Q I take you to the period 1968 when you started with the Faggen Companies and ask you if the client list was heavily involved with New York unions.

A I didn't know that myself in -- well, no, I didn't know that at that time.

Q When, if ever, did you know that?

A Probably late '69 or sometime in '69.

Q Was the client list largely based on New York clients?

A Yes. I would say it was probably true.

Q Did that mean that the client -- strike that.

Did that mean that you were dependent upon client relationships by you and other consultants principally in the New York area?

MR. COOPER: I'll object to that, your Honor.

THE COURT: Well, again, I do not blame you for objecting but I am going to sustain this objection because to me the question is unintelligable.

MR. POWERS: Let me rephrase it, your Honor.

THE COURT: I would think Mr. Castrovinci would get at least three possible meanings out of it where we ought to have one.

Q Did the Faggen Companies send their consultants

out of the New York area to any extent to seek new clients when you started with the company?

A Can I answer that by saying that it was apparent to me that we didn't send consultants out actively soliciting business to start with, so I don't know whether we sent them outside -- we couldn't possible have sent them outside of the New York area. If there was not an active marketing program going on.

Q Were the bulk of your clients New York clients?

A Yes.

Q Had the number of clients --

A Numberwise?

Q Had the number of pension and welfare funds in the New York area stabilized in '68?

MR. COOPER: Your Honor, I'm going to object to all of this. I don't know where we are going with it.

THE COURT: I quite agree with the latter, and I am not sure that Mr. Powers does. But I am trying to extend him every latitude because I am going to get to the bottom of this great case before we are done or else I am going to huff and puff trying, one or the other. Go ahead. Let's hear what this is all about.

(Question read.)

A The type of pension funds that -- and welfare

funds that our type of company would be normally interested in I would have to say probably did stabilize.

Q What kind of pension and welfare funds were those, could you give us a description of they type?

A Yes. Union management type of pension welfare funds jointly negotiated, jointly administered. That type of thing.

Q Were they concentrated in the construction trades?

A In '68?

Q Yes.

A Yes.

Q Did you lose several clients in the construction trade in '68, that you know of?

A Yes.

Q Did you lose several in '69?

THE COURT: Mr. Powers, may I point out that we have allowed this, over stirring objections from the back table, on repetition. Unless you want to question your own testimony or evidence or documents. I never know what you are up to. You remember we have got that in. Why bother Mr. Castrovinci?

MR. POWERS: One final area, sir.

Q Now, were you here yesterday when testimony was elicited from, I believe it was, Mr. Rohn on the question of

excess amounts in the pension funds of the Faggen Companies?

A Yes. I think.

Q Do you know what is meant by the term "excess amount?"

A I assume it is not a technical term so I really couldn't put my finger on what --

THE COURT: Are you asking him to tell us the state of mind of Mr. Rohn? Please.

MR. POWERS: I'm asking him to explain what he understood excess funds to be in connection with the Faggen pension funds yesterday.

THE COURT: Well, this is interesting and I would love to dilate extensively on this but so what.

MR. POWERS: Withdrawn. I will ask something else, your Honor.

Q Could any of the excess assets of the Faggen Companies pension funds be withdrawn today?

A Can I answer the question with an explanation?

Q Go ahead.

A Yes, if the plan is terminated and if there are, in fact, excess concepts.

Q What does termination of the plan involve?

A In what sense?

Q Does it mean that you have to give all the money

back to the various pensioners and the plan doesn't exist any more?

A Just to the extent funded you would have to pay off whatever liabilities the trust and the plan provide for, and if there are any excess monies, they revert back to the corporation, is my understanding of it.

Q Is there any way to get those monies without terminating the whole pension plan?

A By getting the money, you mean physically? I would say no, I don't think so. No.

MR. POWERS: Thank you.

THE COURT: Mr. Castrovinci, a few moments earlier when Mr. Powers asked you whether or not, in your opinion, the type of pension and welfare business that the Faggen Companies in large measure were doing in 1968 had more or less stabilized, may I ask you, sir, are you making that judgment and giving your answer today in hindsight or was that your judgment in 1968? Do you see what I am trying to get at?

THE WITNESS: Yes. I don't know whether I even thought of that problem in '68 so I would have to say it would probably be hindsight.

THE COURT: Well, if it is the latter, I can understand that even with my lack of knowledge. I can see

looking back on a comparative basis. It probably was a period of time when there was -- the market sort of stabilized or it didn't grow much in terms of a proliferation of a lot more units in this field.

THE WITNESS: That's right.

THE COURT: Mr. Burton Cooper? Do you want to ask this gentleman some cross examination questions?

MR. COOPER: Yes, with the Court's permission.

THE COURT: Please do.

We will take a recess.

(Recess)

CROSS EXAMINATION

BY MR. COOPER:

THE COURT: All right, Mr. Cooper.

Q Mr. Castrovinci, do you have a copy of Exhibit 8A?

MR. POWERS: Do you have it in front of you?

THE COURT: 8A.

MR. COOPER: He has it, your Honor. That's the --

Q I understood you to say, Mr. Castrovinci, that the gross for the data processing division for 1969 was $100 thousand.

A The data processing?

Q Yes.

A 1969?

Q Yes.

A Yes, that was from my recollection but I have the actual figure here that was supplied to me by cur secretary-treasurer. I have it listed as -- exclusive of actuarial --

Q Data processing.

A For 1969 calendar year is 220 thousand. 21 rounded. 220 thousand.

Q 220 thousand for '6 --

A '69. Calendar year '69.

THE COURT: Would you call that volume?

A Yes, right. Volume.

Q 229?

A 220. For 1969.

Q 220 for 1969?

A Right.

Q For 1970?

A 260.

Q 260. And for 1971?

A 485. And for '72, 39 --

Q I'll stop at that for a minute.

A Can I explain the actuarial allocation? The volume numbers for the bottom line that I gave, I think I mentioned it before, but it didn't include actual allocation.

In other words, the in-house charge for doing valuations, supplying the actuarial valuations; nor does it include any administrative expenses at all.

Q All right. So that we can get the actuarial gross by subtracting for each of those years the amount of data processing gross; is that right?

A I doubt it.

Q Pardon?

A I don't think so.

Q Well --

A Are you asking me to say yes, you can?

Q Well, was Faggen doing any other business besides data processing?

A You are asking me to compare -- to subtract one number from another number. I don't know what the basis of this number was.

Q When you are pointing to the number for this number, you are pointing to Exhibit 8A?

A Yes, Exhibit 8A. You are asking me if I add the data processing with some actuarial charge will I get what this is. I can't testify to that.

Q Mr. Catrovinci, Exhibit 8A was submitted by Titan for the purpose of demonstrating the numbers which are shown. Now, just for our own sake for a moment, whether you agree

with it or not, according to Exhibit 8A for 1969 the actual operating volume was one million two hundred sixteen, right?

A That's what it says.

Q If you were to subtract the 220 thousand gross of the data processing, that would leave you with roughly a million six, a million zero six of total volume?

A No.

Q For actuarial services?

A No, I think the arithmetic is off.

Q Subtract 220 from a million sixteen.

A You get 996, I think.

Q 996, I'm sorry. 996 was the actuarial gross?

A Based on the assumption that this is a total gross and that doing that -- you may have a fallout or a residue that will curb by just subtracting that out.

Q So you are saying you can't make those computations off this exhibit?

A It depends what -- I would do it if I wanted a ballpark number for some reason, I don't know. I don't know where you are headed with that. You know --

Q I'll tell you what I was trying to get at, Mr. Castrovinci, you gave us some testimony here with respect to the operations of data processing.

A Right.

Q After the business was acquired by Titan.

A Right.

Q And for your purposes you went back and reconstructed some gross numbers of the data processing end of the Harold Faggen Associates business. Sometime within the last year or so, I guess, right?

A When we were selling the division.

Q Yes. All I was trying to do, possibly for the Court, is to demonstrate that from the numbers you gave, using the exhibit which Titan had introduced, to try to reconstruct what was the progress of actuarial business during the same period that you were talking about data processing from these numbers. That's all.

A Yes.

Q That's what I was trying to get you to do from this exhibit, do you understand?

A Yes.

Q And you say it can't be done?

A I say it is misleading.

Q It is misleading to do that?

A Yes, to do it that way would be misleading.

Q It would only be misleading if one of the other numbers were incorrect, isn't that so?

A No. You are asking me for my judgment. I say

that may be from volumewise it would be true but I know what was actually ocurring was that you have got some intangibles here where you will have a client, let me go back to that example, who is paying you $100 thousand. Let's make the arithmetic easier, let's say fifty for actuarial and fifty for data processing. Now you foul up the data processing which is the rule rather than the fact. I have to go in and ask for a ten percent increase for the actuarial. He says I'm paying you $100 thousand. You want a ten percent increase in the actuarial end of the business. Many of our clients just refuse to give it to us because they are saying that they are paying too much to start with to foul up their records and they didn't, in their own minds, make the separation between data processing and actuarial.

What then occurs is that your actuarial business becomes more and more less and less profitable because the normal increase, just to keep up with the cost of living, salary increases and so on, you can't meet those demands and you are under the gun to even go in and ask for an actuarial increase. Addto that the problem that the data processing fees were out of line, and you have got yourself a $100 thousand loser on your hand in a couple of years. Which, you know, do the numbers reflect that? I don't know. I don't think they do.

Q Mr. Castrovinci, have you finished your answer?

A I think so, yes.

Q When we were comparing numbers for the Court before, you drew some numbers about what the data processing gross volume was, right?

A Right.

Q Now, the gross volume has nothing to do with the profit on any of these items; in other words, the profiting on the data processing or the loss of profit on the data processing or the profit or loss on actuarial are different from the gross volume; isn't that so?

A Yes.

Q So all I was trying to get out in my question, Mr. Castrovinci, was to try to compare the same things, namely, gross volume of data processing and gross volume of actuarial in the same period of time, not the profit, just the volume.

A Okay.

Q Now, I was using Exhibit A, which has been submitted here by Titan to demonstrate what the actual volume of overall business was and then taking your number of data processing gross volume and subtracting it from the total volume of the business of the Faggen Companies. That's all I was trying to do. Do you understand me now?

A Yes, I understand what you are doing.

Q You say you can't do that because you say Exhibit A may or may not be accurate; is that what you are saying?

A No. I'm saying this: There's a basic problem again. I will go to my earlier statement, that you have two divisions being run as one --

Q Mr. Castrovinci, all I want then is answers to my questions. If you can't answer them, then say so and I'll give you another question.

A I think I said I couldn't testify whether you could do that.

Q All right.

Mr. Castrovinci, Harold Faggen Associates, when it was acquired by Titan -- withdrawn.

Did you see the 1968 annual report of Titan Group after you came to work for Titan?

A I can't say I have for sure. It is possible.

MR. COOPER: I would like to offer into evidence the 1968 report, if your Honor please.

xx (Defendant's Exhibit M marked for identification.)

THE COURT: Is there any objection to this, Mr. Powers?

MR. POWERS: No.

xx (Defendant's Exhibit M received in evidence.)

Q I show you the 1969 report, Mr. Castrovinci, and ask if you saw that.

A Yes, this is -- I have seen it.

MR. COOPER: I offer the '69 report in evidence.

(Defendant's Exhibit N marked for identification.)

MR. POWERS: No objection.

MR. COOPER: Without objection.

(Defendant's Exhibit N received in evidence.)

MR. POWERS: If you want, Mr. Cooper, we'll stipulate to the next two annual reports.

MR. COOPER: I may not need them. I just want to ask some questions of the witness.

While your Honor is looking at that, can I question the witness?

THE COURT: Go right ahead.

Q Mr. Castrovinci, I direct your attention to page 8 of the report and direct your attention to the Harold Faggen operations. Have you read that?

A Okay, yes.

Q Is there anything incorrect about that statement?

A You mean the whole page?

Q The part dealing with Faggen.

MR. POWERS: I object to that, your Honor.

Incorrect? Is he being asked to testify as to the truthfulness of Titan's annual report at the time when he was an employee of one division?

THE COURT: I am inclined to agree. I would put it differently, however. The witness has not testified about anything having to do with that and I do not see why we badger him by asking him whether or not it is false. He has not complained it is true or false.

MR. COOPER: Your Honor, I believe Mr. Powers had been questioning him, reading from what was Exhibit 8 of the complaint as to what the capacity of the Faggen operation was.

THE COURT: I know, but take a look at that reference. That does not have anything really to do with it. You, like Mr. Powers, like to deal with apples and oranges in one fell swoop. You are looking at the '68 annual report, correct?

MR. COOPER: Yes, I am, your Honor.

THE COURT: I am aware of that. I just read it. He has not testified either for or against that subject.

Q Mr. --

THE COURT: It is in evidence in any event. It is very helpful to you but that does not mean you have to ask the witness about it.

MR. COOPER: All right.

BY MR. COOPER:

Q Mr. Castrovinci, with respect to the pension overfunding, did you have occasion to take a look at your records prior to coming here to check the amounts of the overfunding?

A Again, I would like to not use that word "overfunding" because I'm not sure I have admitted that the plan is overfunded. Number two, no, I didn't check to see the detail or calculation. I have brought the files, not only the time actuarial services files but the trustees files, the administrative committee files, because I know it was apparent that you wanted something from the pension, and even though the subpoena didn't say it, I just brought everything I have on the pension plan.

Q Mr. Castrovinci, what I particularly want to direct your attention to, the way to determine whether a plan has sufficient assets to meet its liabilities is to take the securities of the plan and determine what the actuarial compensation is on those whose invested interests are there and determine what the liabilities are and compare your assets against your liabilities; is that right?

A I disagree with that.

Q You disagree with that?

A Yes.

Q All right. In determining what your liabilities are, how do you reach that?

A You want a technical discussion on how -- I mean, there's a lot of accepted actuarial methods of determining actuarial liabilities. It may be a liability today for a new employee who just started at the age of twenty who is going to retire forty-five years from now, even though he has not worked one day yet or is just starting work, you have a liability for him because he may survive to sixty-five, he may live an additional ten years and may collect a pension. So that is a liability. If you are using the word that way.

Q I'm using it actuarial.

A I am, too, because that is an actuarial liability, also.

Q You take a look at your list of employees, do you not, you start with that?

A Okay.

Q You determine the number and age of employees, right?

A Yes?

Q And you determine what the age of retirement is; that is correct?

A So far, yes.

Q From that you have an actuarial basis upon which you compute what the liability will be for that schedule of employees, haven't you?

A Okay.

Q Now, once you have done that, you can figure out the dollar amount of what it would cost you in order to be able to meet your obligations for those employees whose interests will or may vest, right?

A Or retire.

Q Or retire.

A Or die.

Q Or die, right.

A Okay.

Q So you can come down to a dollar amount of what you need actuarially to fund your plan; isn't that what you do?

A In a lump sum?

Q Either in a lump sum or however you need it, you know how much you are going to earn from its dollar amount.

A Can I tell you what -- let me tell you what we did in the corporate plans before coming to work for Harold Faggen Associates.

Q No, I want you to limit this if you can, Mr. Castrovinci, to specific questions that I ask. I would like to be able to finish with you before the day is out and I

don't want to drag this out.

A Okay.

Q Do you know that on September 30, 1968, the market value of the assets in the plan was $547,362?

A I don't know that.

Q Can you check it?

A Not readily. It would take about five or ten minutes.

THE COURT: I must say, I do not know why you go into this with this witness because he is not here as an accountant.

MR. COOPER: He is here as an actuary, your Honor.

THE COURT: He was not asked about this on direct. And I know Mr. Powers is not objecting, but I mean, are you making him your own witness? I do not understand this.

MR. COOPER: I just wanted to establish through this witness the fact that as of the date of this acquisition the amount of the overfunding, which Mr. Rohn spoke of in general terms, I wanted to get the specific amounts from Mr.--

THE COURT: But this witness has said on direct and on cross that he cannot be sure of his own knowledge exactly what is meant by overfunding and if he accepts it in its plain meaning, he cannot say what it was. Isn't that right, Mr. Castrovinci?

THE WITNESS: Yes. And one other further thing, there is the fact that in 1971 under the direction of Harold Faggen I did evaluation for the plan and the cost in that year came out to be $18 thousand. So if the plan were "over-funded," where did the $18 thousand annual liability come up from? Where in '71 by deposting $18 thousand per year in the bank the implication is that that is going to be the annual cost. Now, whether -- it is one thing to make a deposit and it is another thing to have a rational advance funding method. It is possible that the plan "is overfunded" so this year it is not necessary to put something in, but that doesn't mean anything.

Q Mr. -- let's take the year you just spoke of. I show you this letter of January 18, 1972. I ask you if that is your letter that you just referred to.

A It probably is, yes. It is not signed but I will assume that --

Q Is that the item we are talking about?

A Is this --

Q All I want to do is: You have identified that. Is that your letter to Touche Ross?

A It is unsigned. It is not signed by me but I assume I sent something like this to them. Yes. Okay. Right.

Q Referring to that letter for a moment, Mr. Castrovinci, was it a fact that as of the date in question, this was January 18th, that there was an actuarially computed value of accrued benefits of $201 thousand?

A That's what it says, yes.

Q Was there an actuarially computed value of total benefits of $797 thousand?

A You are reading right from my letter, right.

Q And that the pension fund assets at book value amounted to $532 thousand?

A Right.

Q And the market value on that date was 526 thousand?

A Right. But don't skip over item 6. That's the whole point of my testimony.

Q Mr. Castrovinci --

A All right. I'm sorry. Go ahead.

Q And at that time, did you state that there were fourteen employees as of January 1, 1971 and sixty as of January 1, '72?

A That's what the letter says.

Q Did you know the number of employees as of 1968?

A When did I know the number of employees?

Q Did you ever find out that there were thirty-three employees in 1968?

A Right. There were. Okay.

Q Did you ever find it out?

A I think earlier in my testimony I said I went back and ballparked the '68 valuation using the census of the people on the rolls in 1968. So I had to know how many. Now, whether it was thirty-three, thirty-two or whatever.

Q And paragraph 6 is the 18,785 you are talking about?

A Paragraph 6 says that the current service cost for 1971 was 18,785. Which means that that should be the annual cost if the actuarial assumptions are met. Which seems to indicate that that is going to be the annual costs from that point on.

Q Did you at any time during 1970 or '71 or '72 or '69 make any contribution to the pension fund?

A I can answer that but the point was that --

Q Just answer my question. Was any contribution made from '69 through '72 except for the $18 thousand?

A If you want me to answer from my own knowledge, they were done in the direction of Harold Faggen. I would have no idea whether he made a deposit or not for '69. All I know is I did evaluation in 1971. I performed the evaluation, I got the number 18 thousand, I spoke with Harold Faggen, Harold Faggen said that's what he was going to contribute to

the plan. He accepted my number. Now, if he didn't do one for '69 or '70, I have no idea why it was not done. Was there any reason for it not to be done? All I know is I was instructed to do a valuation in '71.

Q Mr. Castrovinci, if the assets exceeded total liabilities by over $300 thousand, you answered Mr. Powers' questions earlier about a termination of a plan, do you remember that?

A Yes.

Q If the plan were terminated, the amount of assets over liabilities would accrue to the benefit of the company, wouldn't they?

A Accrued liabilities.

Q Accrued liabilities, the amount of assets over accrued liabilities would go back to the company, right?

A Yes, I agree with that.

Q And there is a machinery for terminating plans, is there not?

A I agree with that, yes.

Q And do you know as of this date, 1973, what the amount of the accrued benefits are over the accrued liabilities?

A No. I don't have the number on me. I could probably calculate it for you.

Q As of --

MR. POWERS: Mr. Cooper, are we going to mark that document as an exhibit?

MR. COOPER: I didn't intend to.

MR. POWERS: Could I see it? I didn't see it.

Your Honor, could I respectfully ask that this be marked as an exhibit.

THE COURT: Mr. Cooper has got the laboring oar, Mr. Powers. It is up to him what he wants to mark.

MR. POWERS: If for nothing else, even if it was marked for identification so the record is clear.

MR. COOPER: I will be happy to do that.

xx (Defendant's Exhibit O marked for identification.)

THE COURT: Can we finish this up?

MR. COOPER: I would like to, your Honor.

I would like to mark this the next one.

xx (Defendant's Exhibit P marked for identification.)

Q I show you this, Mr. Castrovinci, and ask you if this is a letter which you sent to Mr. Edelstein.

A Again, It is not signed but it is familiar. I'm sure this is probably an exact copy.

MR. COOPER: I offer them both now in evidence,

O and P.

MR. POWERS: No objection.

xx (Defendant's Exhibits O and P received in evidence.)

MR. COOPER: I have no further questions.

REDIRECT EXAMINATION

BY MR. POWERS:

Q Just a couple of more, Mr. Castrovinci.

If a business is going to continue, can you terminate the pension plan?

MR. COOPER: I object to that, if your Honor please.

THE COURT: It seems to me that you are asking a question. Wouldn't you agree?

MR. POWERS: Let me ask it another way. I withdraw andagree with your Honor.

Q Mr. Castrovinci, have you ever seen a pension plan terminated for an ongoing business in your experience?

A No.

Q Mr. Castrovinci, if there was a requirement of funding in 1971 of 18 thousand in the pension plan and the number of employees in '70 were the same, would their have been a requirement of funding in '70?

A Sure. Right. Yes.

Q Would the same be true for '69 if the number of employees were the same?

A That number should remain pretty consistent. It should be in the same area. Unless there's been a tremendous change somewhere.

Q Now, in connection with these notes, that you made here, breaking out the actuarial portion of the business, from the data processing portion of the business, I ask you if the reports that Harold Faggen sent to Titan Group to the extent you reviewed any such reports made any distinction between the two divisions?

MR. COOPER: I'm going to object to this as not proper redirect, your Honor.

THE COURT: Well, it certainly does not sound it to me. But again I have a problem. Are you asking him to tell us whether or not Harold Faggen wrote letters in which he made some sort of a division between what and what?

MR. POWERS: Between the actuarial wing of the business, the old wing, and the data processing wing of the business.

THE COURT: I point out to you, Mr. Powers, that if this man were to give an answer to such questions, I would not believe it in a million years. I do not see how any people can do such a thing, truthfully.

MR. POWERS: Let me lay a better foundation for that.

Q In connection with your work in preparing those notes, did you review personally any of the reports on the financial results of the Faggen Companies in '69, '70. '71 or '72?

A Sure. I'd have to, yes.

Q Were those reports prepared and submitted by Harold Faggen to Titan?

MR. COOPER: I'm going to object to this, your Honor.

THE COURT: I must say I agree with you, Mr. Cooper. It is probably outside of not only the scope of redirect, but it is probably outside of the scope of this game we are playing. You want to know whether Faggen rendered reports?

MR. POWERS: Which he reviewed and whether the reports made a distinction between the two wings of the business. I'm only asking him for his own knowledge based on reports he's reviewed.

THE COURT: I point out to you again, I won't believe any human being put in this position.

Q Well, Mr.Castrovinci --

THE COURT: I think you are being very unfair to

Mr. Castrovinci.

MR. POWERS: I certainly don't intend to be that or to be unfair to anyone.

THE COURT: I know you do not mean to.

Q Did you ever have any discussions with Mr. Faggen on the presentation of earnings of the Faggen Companies within the Titan organization?

A Yes.

Q Can you fix a date for any of those discussions?

A I'd say after I was vice president of Actuary, probably '71 sometime. That's when there was some discussions.

Q Can you recall the substance of those discussions?

MR. COOPER: I'll object to that, if your Honor pleases.

THE COURT: Well, Mr. Cooper, I understand you have a continuing objection but since we are trying to end this, and since I am as puzzled as you are, again I am going to give Mr. Powers the latitude.

What this is all about on redirect, I would never know. But let's find out rather than argue about it and I can strike it if it is irrelevant. Go ahead.

Q Do you recall any discussions on the subject of reporting to Titan on the operations of the data processing division?

A We always discussed the operation of the data processing. Exactly what he reported to Titan was primarily between Titan and Harold Faggen, but towards the end of '71 I guess I was involved with the statements that Joseph Levine, who at that time was controller, was drawing up, and they were passed around to the staff, and those statements broke out the data processing and the actuarial and you could see month to month how each division was doing, and I remember at the end of '71 that I had not realized up until that point, I thought these reports were going to Titan directly, but I realized at that point that they were not going to Titan.

Q Do you know of any breakout between the two going to Titan?

A Not to my knowledge at the end of '71, no.

MR. POWERS: I have nothing further.

One other thing, your Honor, Mr. Ferrara is going to be a witness on a subsequent issue in this case on the loss of clients --

THE COURT: Please. What do you mean on a subsequent issue?

MR. POWERS: Your Honor, one of the issues, the factual issues that I feel I have to establish in the case --

THE COURT: Look, the only thing here now is,

rather than hear all of your views on matters in the world generally, may we find out if Mr. Castrovinci can be excused? I am sure he is fascinated by you, but I think he is also busy. Can't we let him go?

MR. POWERS: Your Honor, I'm glad to let him go because I'm through with him on the pure liability issue and I want to reserve the right to recall him on Mr. Faggen wooing away clients of the companies at a later point after his discharge. That goes to the issue of invading the value of the business and I don't want to put that on now. I want your permission to do it that way.

THE COURT: Please, if it becomes necessary for you to recall this or any other witness, believe me, I will be alert to that. I simply say, you told me flatly earlier this day, and I did not believe it then and I do not believe it yet, that you were going to finish today. Now, are we finished or aren't we with Mr. Castrovinci?

MR. POWERS: We are finished with Mr. Castrovinci. My last witness is Mr. Frankel and I'm prepared to start with him today. This has gone on a little longer than I planned.

THE COURT: You do not shock me at all. I would not have bet a plug nickel that you would finish today if you spent all night here. Thank you, Mr. Castrovinci. You may

go.

(Witness excused.)

MR. POWERS: Mr. Frankel is my last witness.

R O B E R T J A M E S F R A N K E L, called as a witness, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. POWERS:

MR. POWERS: Mr. Reporter, I thought I reoffered 16 for identification in evidence during Mr. Castrovinci's testimony and it doesn't show it's been stricken, did I overlook reoffering it? It may have slipped my mind.

THE COURT: You did not reoffer it.

MR. POWERS: Can I reoffer it, your Honor? Mr. Castrovinci testified he sent this to Sosa.

THE COURT: Do you really think this is of some constructive benefit to Titan Group in this litigation?

MR. POWERS: I know better than to argue with the Court.

THE COURT: No, I want to know from you. You have me constantly puzzled as to the things you do in this case. I have an awfully hard time -- if I did not get identifications of you and Burton Cooper I would often think you were really playing the adversarial role for somebody

other than your clients in this case. So I press my question, do you really want to put this in the record for Titan Group?

MR. POWERS: Yes.

THE COURT: All right.

Do you object, Mr. Burton Cooper?

MR. COOPER: No, your Honor.

THE COURT: It will be received.

xx (Plaintiff's Exhibit 16 received in evidence.)

THE COURT: We have Mr. Frankel, do you want to proceed with him for a few minutes? It is getting late but we will try something anyhow.

Q Mr. Frankel, when did you first come in contact with Titan Group?

A In early 1969.

Q What business were you in at that time?

A I was the president of Sovereign Construction Company, Limited, whose address was Fort Lee, New Jersey.

Q What was your business background, Mr. Frankel?

A I'm an attorney. I graduated from New York University Law School with a Bachelor of Laws in 1941; I have a Bachelor of Science from New York University College of Pure Arts and Sciences, 1939; I have had graduate studies for three years at New York University, Graduate School; I have studied at the Institute of Design and Construction for two

years; I have had other special courses in Government Claims at George Washington University; and I have attended many other schools pertaining to the construction business throughout the years that I have been associated in that field.

Q How long have you been in the construction business?

A I joined the construction business initially as counsel for several contractors in the Greater New York area in 1948. I formed Sovereign Construction Company in March of 1955.

Q Have you been in that business ever since?

A Yes, I have.

Q Did there come a time when you entered into negotiations for the acquisition of your company by Titan?

A Yes, I did.

Q When was that?

A That was sometime in the late spring of 1969.

Q Who brought Titan to your attention?

A Alan Aronsohn of the firm of Robinson, Pearce, Silverman, Aronsohn and Sand.

Q Was Alan Aronsohn your lawyer?

A He was my lawyer on the sale of Sovereign to another company, Steelmet, Inc. We were in the completion of the sale of Sovereign to Steelmet and the final documents

were being drawn when he exposed the financials of Sovereign to Mr. Robinson and he asked me if I would meet with Mr. Robinson, who was then Chairman of the Board of Titan Group.

Q Is that the first time you met Ben Robinson?

A Yes, it is.

Q Ultimately, did you conclude a deal with Titan?

A Yes, I did on September 12, 1969.

Q Who was your counsel in that deal?

A My counsel was officially Alan Aronsohn and Ben Robinson. Sometime in mid-1969 Mr. Robinson indicated that he would not appear as counsel of record but that I should retain Mr. Simon Sheib.

I thercupon met Mr. Sheib and he subsequently entered into the picture with Mr. Aronsohn and the transaction with Titan was consummated as I indicated in September 1969.

Q That's the same Mr. Sheib who represented Mr. Faggen earlier, isn't it?

A Yes, it is.

Q What were the terms of your transaction, just in general business terms?

A Ours was a stock transfer situation where I received stock in exchange for the total ownership in two companies, one was Sovereign Construction Company, Limited,

which was a general construction company, and the other was Skafran Brokers, Inc., which was a wholly -- a separate but wholly-owned insurance division which I was the owner of, and which had a fairly substantial and profitable insurance business.

Q What was the total market value of the Titan shares you received in that transaction at the time of the transaction?

A Well, I received --

MR. COOPER: Your Honor, I don't think this is at all relevant.

THE COURT: I do not think it is, either. Why do we get into it?

MR. POWERS: It is purely background to show his financial interest in Titan and how he ultimately became chief executive at a later point and then did the Faggen investigation. I'm going very fast, your Honor; if you bear with me, I may lead him just to get the data out quickly.

Q What was the total market value in the consideration you received at the time?

A Well, the total market value, with earn-cut and down-side shares, was 336,248 shares at thirteen and a half dollars at the time of the sale. But I didn't receive the total shares on September 12, 1969. I subsequently did

receive the balance of the shares.

Q On the initial block of shares, can you give us a rough figure of the total market value, what you sold your companies for?

A Well, the initial block of shares was somewhere in the neighborhood of 150 thousand. I can't give you the specific figures.

Q What did you value your companies at for sale purposes at that time?

A Well, we were roughly talking in the neighborhood of six million dollars with the -- we had certain Government claims which were pending and those claims had to be realized for me to obtain the total number of shares.

Q What's the nature of the construction activity that your company engaged in?

A I have our brochure here. I think that would --

MR. COOPER: Your Honor, I don't know what this has got to do with the background of his possessing shares in this company.

THE COURT: Well, I point out, also, Mr. Powers, we know about Sovereign to the extent necessary so far as I can see. It is all recited in the annual reports which are now in evidence here.

Q Why don't you give merely a quick oral description

of the nature of the construction activities you conducted at Sovereign.

A Well, Sovereign primarily has been involved in two basic fields of construction, one is the Governmental monumental field, which involves buildings such as the United States Mission of the United Nations, we have done ninety percent of the work for the Military Academy at West Point, we have done a great deal of work at the Naval Academy at Annapolis; the second phase of our operations is in the development of high-rise low-income and mid-income houses for municipalities, state agencies and other type Governmental financed agencies.

Q When was your dealing with Titan closed?

A September 12, 1969.

Q Did you continue to operate Sovereign as a division head?

A Yes, I did.

Q How long did you continue to operate Sovereign as a division head?

A Up to the present month.

Q During this period, did Sovereign have certain cash on its balance sheet?

A Yes, it did.

Q Did it make transmissions of cash to Titan on

request?

A On requests we did until Harry Rosen was the chief executive officer in late December 1970. At that point I refused to make a transmission of a substantial amount of-- a substantial amount of cash but we have since 1969 transmitted to Titan from Sovereign $4,516,436 in cash.

Q Have you ever taken back any money from Titan in Sovereign?

A We have not.

THE COURT: I must say, Mr. Powers, from your own viewpoint, why get into this? Is this a comparison game of some kind?

MR. POWERS: No, sir. I feel it is part of the overall background, sir. I am moving very fast.

THE COURT: It is very interesting, I am sure, but I do not feel it has anything to do with the Titan's claims in our case.

Q Now --

THE COURT: Wait a minute. It is about 4:30 and I have listened to this all day and we are not going to finish with this gentleman, I do not think, are we?

MR. POWERS: Not today, no.

THE COURT: I could have sworn that.

Now, I have run out of time for you people. I

have got to try a criminal case which, despite my acquiescence to the viewpoint which your concerns and those of the Court of Appeals deserve honoring, I also have a case which under federal law has got to go on Monday because it is an old case. Otherwise, we have problems there.

So the earliest I could possible take you, and I am not even certain of this, would be next Wednesday. This case has already gone on twice as long as it should have.

Have you got a lot of witnesses, Mr. Cooper?

MR. COOPER: No, I don't, Judge.

THE COURT: Can you give me an estimate of how many days you need?

MR. COOPER: I'd be surprised if we went more than half a day.

THE COURT: I think then with your blessings and agreement, I could suggest that this case which I am going to start on Monday to a jury should not really take long. I think we could probably get a jury verdict on the night of Tuesday, so what about saying that you will start on the 13th, which is next Wednesday at 10 o'clock, and Mr. Berner and I will guarantee to communicate with your offices on Monday or Tuesday to let you know how we are doing and if there is any problem.

MR. POWERS: Your Honor --

THE COURT: No more excuses for Lawrence Powers. I have indulged Lawrence Powers because of his personal problems since I first got this case on January 18th. No more. I cannot do it.

MR. POWERS: I'm only asking if I can be excused after the 13th because of this family trip that I booked.

THE COURT: Mr. Powers, I repeat, I think I have been more than fair to you. On January 18th I was told by the assignment committee that this case has been reassigned to me by Judge Ryan. I got the file, I read that there was a directive in there that the case should have been tried long before I even heard of it. I did everything I could in good faith to try to get you fellows on it. It is true that the defense had some problems, but basically the problems were yours, you were engaged in this and engaged in that, which I accept. But I just cannot go on forever like this.

MR. POWERS: It will only be about a six-day break, your Honor, and it is --

THE COURT: A six-day break to me, Mr. Powers, is important. You treat me as though I am your private little punching bag. I am not. I have other litigants who have every right to assume that their cases are important, too.

MR. POWERS: Is there any chance we could work

for some time tomorrow? Maybe I could stipulate in most of it.

THE COURT: You are not the problem on that. Mr. Cooper and his office are entitled to put in something here.

MR. POWERS: I was going to say I could perhaps stipulate most of Mr. Frankel's testimony because a good deal of it is in his affidavit and finish with him very quickly.

THE COURT: That is no assurance that Mr. Cooper and his associates might not want to cross examine. I do not know. Again, you go to a different drum than I do. I do not understand you at all. Now you listen to me. I feel that I have accommodated you on a number of occasions where you pointed out that you were engaged in other matters. I was willing to do that up to a point, but I think we have reached the point of no return on that sort of thing.

MR. POWERS: Your Honor --

THE COURT: Mr. Cooper also says that he thinks he can finish in a half a day, so maybe he can finish next Wednesday if we get any luck at all, and believe me we are deserving of some luck somewhere in this affair. Because as I understand you, you were not going to leave with your family until next weekend; isn't that correct?

MR. POWERS: I'm leaving the 13th in the evening. If I can finish this case on the 13th I can do it.

THE COURT: Well, I suggest it is your plain duty to come in on the 13th. You can talk to Mr. Cooper and maybe you could find out from him what he plans and maybe you can both agree that you will finish in the day of the 13th. But you treat me as though I am your own private doll to kick around in this matter and I do not like it. I recognize that this is becoming a habit in our profession and I know you do not mean it that way, but that is the way it ends up. You seem to be totally oblivious to the problems of anybody else but your own.

And I do not think that that is quite fair now that we have tried to work so hard to fit this in to accommodate you more than anybody else. So you give us a little accommodation, if you can. I do not want you spoil your vacation, I admit that.

MR. POWERS: It is not a normal trip, it is something with an exploratory group that is flying into the Bay of St. Lawrence and I have paid for the trip seven months ago.

THE COURT: Look, I do not want to quarrel with you and your personal affairs are none of my business. What is my business, however, is my own time in this building and what I do and the wretched conditions and I think I am entitled

to a little say on that. Let us try to be optimistic, Mr. Powers. Let us try maybe to finish next Wednesday so that you can go out of here in a blaze of glory and do whatever you want to do and then I will have you in here later for argument and then I will decide this case, because I think frankly more than anything else a decision, even a wretched decision, would help these parties immeasurably. I have that very well in mind and I am going to be prepared to expedite decision here, too.

So I am sorry, but I think I am getting -- giving you a lot more than I am getting from you as far as cooperation, and I know you are a busy man and you are a small firm and maybe that. But let's struggle to do this next Wednesday. I will call you if we run into difficulty. Please talk with one another, if you can, and see whether you cannot agree that you pretty much will finish on Wednesday and then you can go. Good day.

(Adjourned to March 13, 1974 at 10 o'clock, a.m.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

867-868

TITAN GROUP, INC.,

vs.

HAROLD FAGGEN

Before:
HON. HAROLD R. TYLER,JR.
District Judge.

72 Civil 1797

New York, March 13,14,19, 1974

STENOGRAPHER'S MINUTES

dpd-1

TITAN GROUP, INC.

v. 72 Civil 1797

HAROLD FAGGEN

March 13, 1974
10 A.M.

THE COURT: Mr. Cooper, I think the laboring oar is in your camp, is it not?

MR. COOPER: I don't know. I don't know whether Mr. Powers said he had finished with his direct of Mr. Frankel.

MR. POWERS: No.

THE COURT: That is right. I beg your pardon. He had not. I am at fault. He has not. According to my notes, he definitely has not.

So, Mr. Powers.

MR. POWERS: Shall we resume?

THE COURT: Yes.

MR. POWERS: Have a seat, Mr. Frankel, and you will continue under oath.

Your Honor, counsel have stipulated to put in the remaining three annual reports of Titan, '70, '71 and '72, to complete the dossier on that, and if we can have that marked as an exhibit, I would appreciate it.

MR. COOPER: They will be three separate exhibits.

MR. POWERS: Yes.

XXX (Plaintiff's Exhibits 20, 21 and 22 marked for identification.)

MR. POWERS: It is stipulated they can be admitted, if the Court please.

XXX (Plaintiff's Exhibits 20, 21 and 22 received in evidence.)

ROBERT J. FRANKEL, called as a witness by plaintiff, having been previously duly sworn, resumed the stand and testified as follows:

MR. POWERS: The '73 annual report isn't ready yet, your Honor. That is why we didn't put it in.

DIRECT EXAMINATION CONTINUED

BY MR. POWERS:

Q When did you first meet Harold Faggen, Mr. Frankel?

A Sometime in the late spring of 1970, when I was nominated for the board of directors for Titan.

Q You testified previously your acquisition was closed in or about September of 1968, is that right?

A That is correct.

Q They took over your company at that point, and you were nominated for the Titan board in or about April or May of 1970?

A That is correct.

Q Did you have a conversation with Harold Faggen at

dpd-3 Frankel-Direct

about that time?

A I had a conversation with Harold--

MR. COOPER: Just yes or no, your Honor.

A Yes.

Q Can you fix a place for that conversation?

A It was at the board meeting. I was introduced to the members of the board.

Q What did Harold Faggen say to you in that conversation?

MR. COOPER: Objected to.

THE COURT: This is in the fall of 1969?

THE WITNESS: 70, sir.

MR. POWERS: Spring of 1970, your Honor. This block of testimony--

THE COURT: I know, but things are a bit confused. Bear with me. This is a conversation you say took place in the spring of 1970?

THE WITNESS: Yes.

THE COURT: And where were you?

THE WITNESS: At the board meeting. The meeting prior to the annual meeting of the board.

THE COURT: In what city are we?

THE WITNESS: I think we are in Louisville, Kentucky, if I am not mistaken. No, excuse me, we are in New York City.

THE COURT: We are in New York City. Now, you had this conversation on an informal basis, or are we in the course of a board meeting.

THE WITNESS: No, I was not a participant in a board meeting. It was after the board meeting when they brought me in to meet the members of the board, and we had a conversation where we were discussing our different companies. After the board meeting was held, at which I was nominated to be a director at the subsequent annual meeting of the board, the stockholders meeting.

THE COURT: In any event, you and Harold Faggen had a personal conversation in which the two of you alone were involved, is that it?

THE WITNESS: That is correct.

THE COURT: Good. I don't know what this is about, Mr. Cooper, but I am going to listen to it, and if it is relevant we will accept it, and if it's not, we will strike it.

Q What did Mr. Faggen say to you?

A He had asked me about the Sovereign Division operations and I had indicated to him we were in the general construction field specializing in monumental and urban housing development work, and he indicated that--he stated that that seemed to be a business highly volatile and subject to a lot of contingencies that are difficult to estimate, and I agreed

with him, and I asked him what was his business like because I had never known anything about an actuarial business other than I knew insurance companies did have actuarial departments.

He stated to me that he was in the process of performing services for various union pension and welfare funds, and that they did a lot of work for unions related to the construction industry.

He said one of the advantages of his business was the fact that once he had a fund in-house because of the data information that they compiled on the members of the union, it was almost a locked account. The cost of moving that account from one actuary to another became prohibitive, so as long as the services were being performed well that it was a situation that would be an ever-ongoing situation, and contrasted to the construction business where you would finish a job you were technically out of work, you had to bid another job in order to get more work.

He also was curious about the data processing efforts being performed by Sovereign in-house at that time. We had basically been running our payrolls through IBM equipment, and he proposed to me that with his actuarial and data processing business he was able to assume all of these obligations of all the various newly-acquiried divisions of Titan, most of whom were construction divisions, and that that would

give him a great opportunity to expand his operations and save us money because he felt that he could design programs which would be very conducive to our operations.

Q Did you see any figures on his operations at that time?

A No.

Q Did you know anything about the sales or earnings in his operations?

A None at all. Nothing at all.

Q Did you then go on the board of Titan?

A I went on at the annual meeting of stockholders. I was elected as a member of the board.

Q Do you recall any discussion on the earnings of the Faggen Company in either the summer or fall of 1970 in the board meeting?

A Well, what had occurred was that a combination of the Louisville-based organizations, the Chicago-based organizations, and the Cleveland-based organizations, in conjunction with Ben Robinson's group, which was the old-line directorship, decided to caucus to oust the Irell-Manella, Jerry Block group from Los Angeles. I was not a participant in that at the time, because I was a relative newcomer, and in the middle of the year they succeeded in arranging for the removal of Ed Kaufman as chairman of the board.

MR. COOPER: If your Honor please, I am going to move to strike all of that. It's first of all not responsive and, secondly, irrelevant.

THE COURT: I am not sure. I agree with you it's not responsive, at least, as I understood the query.

MR. POWERS: Your Honor is correct. If I can ask the question again to clarify for the witness, it might be helpful.

Q Mr. Frankel, my question is directed at any discussion between you and Mr. Faggen, or between other members of the board and Mr. Faggen in your presence, or any written information that you acquired as a director, on the earnings of the Faggen Company in the summer or fall of 1970.

MR. COOPER: I am going to object to that. We are not trying the earnings of the Faggen Companies in the summer and fall of 1970.

THE COURT: I must say I don't know where all this is leading.

MR. POWERS: It's directed to the issue of lulling and the revelation, step by step, of what the real problems in the Faggen Companies were as this witness acquired knowledge of them as a director of Titan.

Essentially what I am arguing is that the Faggen Companies were totally under Mr. Faggen's control, and that

others in Titan didn't really know what the earnings, problems, and day-to-day operations were in the Faggen Companies, and didn't become aware of these problems until this series of conversations I am going into.

THE COURT: Once again, I have to say that we are trying everything, really, in this unfortunate lawsuit except the 10(b)(5) case. We spend more time going into every other dispute of greater or lesser degree.

MR. POWERS: My problem is that I feel that lulling activity after the occurrence of the 10(b)(5) violation to keep the alleged victim from knowing what the earnings and problems were prior for a period of years is part of the violation, and I have a right to go into the three or four conversations with Mr. Faggen.

THE COURT: You have put on a series of witnesses who claim that they have come to all of these financial computations and conclusions based on the very records during this period of Titan, including the Faggen group, so how he could be lulled on the one hand and, on the other hand, bring forth all this testimony of an expert nature otherwise based on your in-house records, I don't understand. That seems to me to be very, very much of a conflicting position.

MR. POWERS: What I am trying to show is the step-by-step revelation of this data to the principals of Titan

during the relevant period.

If your Honor recalls, the deal was closed late in 1968. That means you had a whole year before the earnings of 1969 show. We are now then in the spring of 1970, when those earnings are beginning to show.

THE COURT: But can't we get down to it without all these highly subjective questions and subjective answers about these conversations.

From your own point of view, this is very, very self-defeating, I think. You seem to be groping for every straw as we go along here. If there is something to this, fine, I will take it subject to what might develop, but I ask you, can't we get to the kernel of this rather than wandering all over the barn and talking about all these things? We know these people don't like each other now, and that's been established, but we don't have to go into that. There must be some other area you can get into more fruitful.

Q All right. Now, were there any discussions on the Faggen earnings in the fall of 1970 at the board meeting?

A Only at the time that Mr. Kaufman made his speech, which was his retirement speech, in the July meeting in which, for the first time, he indicated that he felt that the Faggen Companies were not producing the revenues that were anticipated, which would have been sufficient to meet the cost of the con-

vertible debenture interest charges.

Q Did there come a time early in 1971 when you were made chairman of the board of Titan?

MR. COOPER: Excuse me, your Honor. With respect to the evidence that has just been introduced, I don't know whether your Honor took that subject to connection or took it for whatever it was worth.

THE COURT: I am taking it--I am hoping that we can bring this mortal battle to an end, so since I don't have the foggiest notion, we go off on so many different directions, both sides object to practically everything, and it's just really very, very taxing to listen to. I am going to take this. I am assuming, as Mr. Powers argues, this has something to do with your case. I only implore that we do it, and I am not going to have any more arguments. This is just a very wearing situation, mainly because the principals don't care for each other, and I am afraid it has affected the way we are performing professionally here in this trial.

Now, go ahead. You have your exception, Mr. Cooper. You have objected to practically everything, and that is clear. So let's not argue about it.

Go ahead, please.

Q Were you made chairman of the board of Titan in or about February of 1971?

A I was chairman and chief executive officer.

THE COURT: This was in February 1971?

THE WITNESS: February 1st.

Q What were the circumstances under which you were made chairman?

A At the time I was made chairman, the company was in default on a $4.5 million performance bond at the Yosemite Lakes Project in Yosemite. The threat of that default on that bond jeopardized all the construction divisions in Titan because that would preclude any division from being able to proceed with their business because they couldn't get bonds. The company needed something like nine [illegible] odd thousand dollars to meet current liabilities. [illegible] no cash in the principal company. There were 97 active and semi-active divisions in Titan all over the United States. There was absolutely no control over who was running what division. There was no central cash control. There was no auditing controls. The company was technically as close to a Chapter 11 situation as they could be.

The only divisions that had any financial power at that time of consequence was my division, which was Sovereign Construction Company, the Stewart Mechanical Division in Louisville, the Multiplex Division in Cleveland, and the Redi-Electric Division in Louisville. Those four divisions had a

positive cash flow of some consequence, and I had in my division over $2,000,000 in cash in the bank. So they had called on me to take over control, to determine what major surgery could be done to eliminate roughly 85 divisions who were spending more than they were making.

Q What did you do with respect to the Faggen Division when you became chairman of the board, if anything?

A I did nothing initially because I was under the impression that the Faggen Division was a very--

MR. COOPER: I am going to strike everything after the word "nothing", your Honor.

THE COURT: Yes.

A I did nothing immediately.

Q When did you next have contact with Harold Faggen?

A The first contact was at a meeting at the Yale Club with Ben Robinson and Harold Faggen, and that came about at the suggestion of Ben Robinson.

Q Can you fix a date for that?

A That was in March of 1971, around March 26, to be exact.

Q What did Mr. Faggen say at that meeting?

A At that meeting, I was trying to find out why the Faggen Companies had not been able to participate in furnishing more cash to Titan, which we needed at that time badly to

meet obligations, and I had previously telephoned Mr. Faggen requesting that he send some cash to Titan, and he was going to look into it.

I was concerned with the fact that Faggen, while he was on the board of directors, and I made these statements to Mr. Faggen and Mr. Robinson--

MR. COOPER: I object to all this, your Honor.

THE COURT: Please, gentlemen, the question is not your concerns or your innermost thoughts, Mr. Frankel. The question is what--

MR. POWERS: What was said.

THE COURT: Let's stick to it. We are really going to blow this case out of all imaginable proportions with these highly subjective musings.

Now, let's stick to it.

THE WITNESS: I made notes of that meeting, if I could get the notes to refresh my recollection.

Q Mr. Frankel, the notes I hand you, they were marked in the deposition as Exhibit A. Do you want to have those in front of you? Do you have another copy of those?

A Yes.

(Recess.)

Q Mr. Frankel, are you now looking at some notes?

A Yes, sir.

Q You made those at the conference?

A Yes, I did.

Q Tell us what you said and what Mr. Faggen said at that conference at the Yale Club.

A The first item that came up was a question of audit, which involved some $38,000 in fees, which Mr. Faggen had collected and had turned over to the company, and this was for work that he was doing of a professional nature but which was not being billed by the company, and I asked him what that was about because I didn't understand it, and he explained that he was doing certain services which had to be billed individually as distinct from the corporation, and he remitted to the company those fees that he received.

I was very concerned, and I stated to both Mr. Robinson and Mr. Faggen, that I was upset that here we had a company going into very serious financial conditions and that he was sitting as a creditor instead of being part of the team that was going to be needed to save this company, and that I wanted him to convert his shares, convert his notes into shares in order to take a stockholder position.

He then proceeded to discuss and state to me what the advantages of his company to Titan was. He said that they had pre-tax earnings in 1970 of $205,000. Now, at this point we still didn't have the 1970 figures, so there was no way I

could evaluate this.

He said, even more important, they have reserved incomes of $231,266, and this was shown as a current liability, but it was unreal, it really wasn't a current liability, and therefore his earnings were in effect more than what they were showing.

He stated that he had delivered to Titan cash of $721,000 since December of 1968, so that Titan had received a financial benefit from this acquisition.

He predicted that in the year 1971 there would be $175,000 additional fees on data processing work which would augment to the growth of the Faggen Division, and therefore that the Faggen Division didn't have to be one of my real concerns, that he had it under control, and that it was going to be a profit-making cash generating division.

When I talked to him about the conversion into the stockholder position, he was very concerned with the income tax problem that would be generated by that conversion, and he considered that that conversion would constitute a taxable event and that the original deal had been set up as some form of an installment sale.

He also indicated that he had $2,700,000 of the total $5,500,000 in notes pledged against loans that he had made so that this would be a problem but that he could handle

that problem.

I was very concerned with the fact that we were paying $220,000 interest to him a year, in addition to salaries and so forth, which it appeared from what I had heard at the prior board meetings the company was having difficulty in paying, so it seemed to be an inconsistent position with his earnings capability as compared to his actual physical cash generation.

They mentioned to me at that time that Ed Kaufman and Tony Frank had made the deal, and that Si Sheib was the attorney and, of course, I had known Si Sheib by this time because he was the attorney that had handled my acquisition.

He stated to me--

Q Who is "he"?

A Mr. Faggen. He had a $10,000,000 cash bid from Diebold for his company and that he sold to Titan despite this cash offer, and that he had done Titan a favor because he could have done much better had he made the Diebold deal.

He claimed $2.5 million in assets at the time of the transaction, that the deal was made in December 1968 based on a September 1968 audit, that he had delivered marketable securities of $1,278,000, that he received $220,000 per year interest on the stocks that he had thrown into the sale, and that's the language he stated--he threw the stocks into

the sale, and the stocks themselves were generating $220,000 a year which was the interest we were paying him on his notes.

He claimed of the $750,000 given to Titan, $440,000 had been repaid to him, and he said that the current 12-31-70 net worth of the Faggen Companies was $1,367,000.

I was naturally--because I am not a tax man, I said to him, well, if we rescind the merger under some concept of a recission of a merger, what would be your problem tax-wise, because, in effect, that would nullify any of the tax consequences. And they agreed that they would investigate that possibility and that Ben Robinson would write to me on it.

Subsequently--

Q Now, after that meeting, did there come a time when Faggen was renominated for the coming year to the board of Titan?

A When we came up to the nominations in April--

Q This is April of 1971?

A Yes. At the Board of Directors meeting of April 13--

MR. COOPER: Can't we just have a yes or no answer?

THE COURT: I would have thought that you had understood this question would be susceptible of a yes or no answer, and I gather the answer is yes.

Q Was there any discussion--

THE COURT: Wait a minute. I want to find out from

the witness. Is that correct, the answer was yes?

THE WITNESS: He was renominated April 13, the '71 board meeting.

THE COURT: The answer is yes. Next question.

Q Did you oppose his renomination at the board meeting?

A I did.

Q What was said on that subject?

MR. COOPER: I object.

Q What was said by Mr. Faggen on that subject?

THE COURT: Wait a minute. We are in the board meeting--

MR. POWERS: With Mr. Faggen present.

THE COURT: Was Mr. Faggen present at the board meeting?

THE WITNESS: Yes, he was.

THE COURT: And you want to know what Mr. Faggen said at the board meeting?

MR. POWERS: Yes, sir.

THE COURT: All right.

Q What did he say?

A He said, when I objected, if he was not permitted to remain on the board it would have a serious adverse effect on his business, that people would get the impression we did not have confidence in him and that would possibly lose actuarial

clients for him. I did not have control of the board at that time and the board overruled my position on it, and he was nominated.

Q After that renomination, he was elected to the board again for another year, is that right?

A Yes.

Q And Robinson stayed on the board, too?

A That is correct.

Q What was your next contact with Faggen?

A In May, the first interest payment on the debentures, while I was chief executive officer, came due, and I wrote him a letter on April 30 authorizing him to pay $110,000 interest due to him from his own division funds, and we had discussed this generally at the board meeting of the 13th and--

Q What did Mr. Faggen say, if anything?

A Subsequently, on May 3, in response to my letter, I received a letter from Faggen stating that the subsidiary did not have $110,000, he denied any discussion of this fact in our April 13 meeting, and on the same day I received a registered mail letter from him, putting Titan in default on 15 days' notice.

Q That was in default on the whole bond issue?

A That is correct.

Q What happened after that between you and Mr. Faggen?

A Well, we had a board meeting. Because of this, I called a special meeting of the board on May 13. I had met with Ben Robinson and Faggen concerning this in the interim, and stated to the board that I had met with Mr. Faggen and Mr. Robinson re converting his debentures in accordance with the desires of several members of the board, as well as myself, and that Mr. Faggen was unwilling to take anything but a creditor position.

I indicated we had not paid the last installment of interest on the Faggen notes and that Faggen had given notice of acceleration of the entire amount due, and that I was trying to meet with them to structure some method of resolving this problem.

Q What was the resolution of the dispute over paying the interest?

A Mr. Sheib, who was the attorney for Mr. Faggen, was called into the matter and met with me to discuss the entire problem of the Faggen situation as it affected Titan.

Now, one of the matters that was discussed at the board meeting was the fact that in order to get bonding power you need net quick assets, net quick assets of a bonding company are those assets which can be immediately liquidated so if there is a development in performance they have the cash with which to go in and purge the defendant.

The Titan balance sheet was so heavily loaded with debt and with non-liquid assets that it ended up with a net quick asset position of zero. And the result of that was, and the reason why I was ultimately brought into this position as chief executive officer, I had personally pledged over $2,000,000 of my personal assets in order to get bonds for Sovereign and Titan, in order to perpetuate this division, and I tried to indicate to them if I am willing to put every penny I owned on the line for Titan, the least he could do was get on the darned team and help us save the company.

Q Did you charge Faggen with fraud at that time?

A No, absolutely not. I stated to him that if he didn't get on the team, and the company went bad, his debentures weren't worth a penny, and that the only way we could make those debentures good was by everybody pulling together to make the company good.

When I discussed this with Si Sheib, he said if I would pay the $110,000 that would give us a six-month period to restructure some kind of arrangement with Faggen, and I agreed on that basis, and on the 17th of May, in accordance with my understanding with Si Sheib, I sent, I directed that the $110,000 be sent to Faggen.

Now, keep in mind Titan's home office was in Louisville, Kentucky, and I was in Fort Lee, New Jersey, as the

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division head of Sovereign, so while I was chief executive officer, I was not running the day-to-day operations of Titan, which was being operated out of Louisville.

MR. COOPER: Your Honor, I forgot the question.

THE COURT: I have not, however; but let's go on.

Q Now, Mr. Frank, did there come a time in July of 1971 when you had a discussion with Faggen at a board meeting of Titan?

THE COURT: This is July?

MR. POWERS: Yes, two months later. The last conversation in dispute was in May.

THE COURT: No, please, you only confuse the situation. The answer is July, right?

MR. POWERS: Yes, sir.

Q Did you have a conversation in July of 1971 with Faggen?

A The answer is yes.

Q Where was that conversation?

A That was in New Jersey.

Q Was it a board meeting?

A Yes.

Q Was Faggen present?

A Yes.

Q What did you say to him and what did he say to you?

A We were discussing what was wrong with his operations because they were not generating--by that time I had had the annual figures for 1970, and they indicated a substantial reduction in what had been anticipated to be the Faggen numbers. We were discussing what was wrong with the division, and Faggen said that the problem with his division is that he was expanding the data processing and that the cost of development in the data processing was eating up the actuarial profits and that he had been directed to do this by the Kaufman group, going back several years.

So I asked him to explain what happens when he gets a data processing client and he says when he gets a data processing client he has to program, and it takes about two years to pay for the cost of the program before that data processing client becomes a break-even point.

So I said to him this just doesn't make sense to me. You mean to say you can't get the client to pay for the development cost. He said, no, that that isn't the procedure. So I said we will, under those circumstances, in order to establish the maximum profitability for Titan and the maximum cash flow from your division, don't take any more new clients, but get to the two-year point where your existing data processing clients will be generating a profit, so that your actuarial will be profitable, your data processing will be profitable

and you will have a cash flow.

I gave that direction at the board meeting of July 30, 1971. Mr. Faggen disputed that. He claimed I was trying to restrict his operations.

Q What was the resolution of that meeting?

A The meeting ended on my giving him a direction to cease expanding the data processing division, and to maximize the earnings of the actuarial and the data processing accounts that he had in-house.

Q The following month, in August of 1971, did you have another conversation with Mr. Faggen with respect to his financial statements?

A At the prior board meeting, I had asked him to send me information which would give me some kind of a handle on what his data processing and his actuarial divisions were doing so that I could see the relationship of where the money was going, and on August 31, sometime after August 31, I received financials of the Faggen Company dated August 31, which showed that there was an actuarial profit of $295,759 projected up to that date.

Q Was that for eight months of the year?

A To August 31. And there was a data processing loss of $141,843.

Q Had you ever seen financial statements before those

which broke out the profit between data processing and actuarial work?

A I had not.

MR. COOPER: Your Honor, I have tried to observe your Honor's direction--

THE COURT: I take it that you have a continuing objection to all of this.

MR. COOPER: Yes, your Honor.

THE COURT: I understand that. But we don't seem to be able to get down to the end of things in the formal way, therefore, I am adopting this methodology principally so that we can get this to an end.

Let's go forward. Anything else, August 1971?

Q Did you have a face-to-face conversation with Faggen at or about that time?

A It came up again in the September board meeting.

Q What happened? Was Faggen at the board meeting?

A Yes.

Q And you spoke and Faggen spoke at the meeting?

A We had a very serious dispute at that board meeting concerning my prior directions not to expand. He wanted to know if that meant he couldn't take on any new clients, so I qualified the direction not to expand to say that my intent was to maximize profits to Titan, and that the only way he

could take on a new client is if the client agreed to pay the development costs so that the first contract with the client would produce a profit, and that there was no such thing as carrying a client for two years non-profitable.

Q What did Faggen say?

A At that point, also, I reviewed the financials which I received because there was an arbitrary allocation of administrative costs between actuarial and data processing, and I asked him to explain why he didn't keep a direct cost system which clearly identified the costs of data processing vis-a-vis the actuarial, which we do on all our construction jobs. We don't commingle costs from one construction job to another. He said it was difficult to do because the actuarial work also involved data processing, and that many of the actuaries and other executive personnel who were really in the actuarial business were costs to the data processing, but you couldn't really define that cost, they didn't keep time sheets, they kept no record of doing that.

Q Now, after that conversation, did you have a telephone conversation with Faggen in or about September of 1971 on the subject of Ben Robinson?

A Yes, I did.

Q Would you fix a date for that conversation and tell the Court who called whom and what was said?

A On September 7, 1971, I was in my office with an attorney I had hired on another matter involving Titan, named Sidney Silverman, and Harold Faggen called me. By this time, I was very concerned--

THE COURT: No, no, please.

Q Just say what you said and what he said.

A I asked Harold at that time if Ben Robinson had ever represented him as an attorney in any capacity prior to the merger between Faggen Associates and Titan.

Q What did Faggen say?

A Faggen stated, and I made these notes at the time, that Ben Robinson became his acquaintance in October 1946 when Ben Robinson was the attorney for the first fund that they ever did business with. This was the Lithographers' Labor Union. On that occasion, Harold Faggen was asked to do a study for them which ultimately resulted in Faggen Associates being hired to set up a pension fund along with Ben Robinson. Ben Robinson at that time was attorney for the Lithographers' Union and Faggen became the actuary.

And that condition continued until the date of the memo, which was September 7, 1971.

Faggen also stated that Joseph Warren was not only his C.P.A. but also his attorney and had incorporated the various Faggen corporations. He never had any legal work

which required the services outside of Joseph Warren other than a matter with the insurance department of the State of New York which was handled by the firm of Greenbaum, Wolf and Ernst, and he categorically declared that he never had any legal attorney-client relationship with Ben Robinson up to that time prior to the merger. In other words, he had it, of course, because Ben Robinson's firm represented Titan, but not prior to the merger.

Q Did you have another conversation on the subject of the Faggen businesses at the end of 1971 with him in or about December?

A At the board meeting on December 9, 1971, which was held in New Jersey, we were very concerned with the Faggen situation because his employment contract ended in December 1971, and here we were with the division that was having a financial downtrend, and I asked Faggen again would he phase out the data processing operation, just phase it out, give it out to another data processing company, specialists in the field, and get it out of his actuarial business because it was quite apparent his actuarial business was profitable and his data processing business was pulling the company down, and he said he absolutely refused to do it. He said he would lose all his actuarial clients if he did that.

I then said to him, "I want you to furnish me a

report setting forth the projections for the year 1972 of both the actuarial, completely distinguished from data processing. I want a full report, I want a list of your clients of each account, I want to know the costs, I want all the information that would permit the executive committee of Titan to review the feasibility of phasing out the data processing operation, or selling it off, but getting it out of the company."

Q Now, did you follow that request up with a letter, which I show you now, dated December 15, 1971?

A Yes, I did.

Q And did you receive an answer to that letter dated February 2, 1972, from Mr. Faggen?

A The answer to that is, "yes".

Q And did you respond to Faggen's letter with a letter dated February 3, 1972?

A Yes.

MR. POWERS: Your Honor, may I offer these three documents in chronological sequence in evidence?

THE COURT: Aren't they in the bound volumes already?

MR. POWERS: No, sir. You have not seen these yet, sir.

XXX (Plaintiff's Exhibits 23, 24 and 25 marked for identification.)

MR. COOPER: My objection is to relevancy.

THE COURT: Do you really object to these letters?

MR. COOPER: It is not a question that I feel there is anything damaging in them, no, but it's just a question of what issue are we trying here.

THE COURT: All right.

Q Now--

THE COURT: Wait a minute, Mr. Powers.

From your side of the coin, Mr. Powers, what do you think this really means? In other words, what's the relevancy, as you see these letters?

MR. POWERS: This is showing by the fall of 1971 the real operations of the Faggen Companies were first becoming known to Titan's management, and the questions were being asked, and Faggen was still telling stories about how data processing was a great business, and they had this capacity, and it was just a matter of bearing with him a little longer.

THE COURT: Fine. I know what the letters say, I just read them, but that isn't it. What does this do to prove your 10(b)(5) claim?

MR. POWERS: It shows he was using the same style of presenting his business in '71 and '72 as he did in 1968. His style of earnings that will be there that never are, and accruals that aren't real, are reflected in this group of letters

as reflected in Exhibits 1 and 3 that started this whole thing back in 1968. The same individual presented himself--

THE COURT: It's what might be called subsequent similar act evidence?

MR. POWERS: I think it also goes to credibility, and a good deal of the lulling evidence, of course, is also designed to register an attack on credibility.

THE COURT: I don't really think that when you are trying to prove a case you have to just prove credibility or lack of credibility. I can understand in human terms why your principal and you want to do this, but in terms of a law suit, I continue to be mystified.

I am going to take these subject to connection, meaning by that that I have extreme doubt that they really have anything to do directly with this claim of Titan in this law suit at all, at least in respect to the federal claim pleaded in this complaint.

So let's go ahead. Anything else?

XXX (Plaintiff's Exhibits 23, 24 and 25 received in evidence.)

THE COURT: Anything else?

MR. POWERS: Yes.

Q Mr. Frankel, did there come a time in April of 1972 when you made a query of the Robinson law office to find out

if they had done any work for Faggen in connection with the Mason Tenders Pension and Welfare Fund?

A Yes, I did.

Q And I show you a document with an envelope attached. The document is to Ben Robinson from Matthew Silverman. Is that his law partner?

A Yes.

Q But the envelope says to Robert James Frankel from the Robinson office.

Is this information you received from Ben Robinson's office in or about the date shown on it?

A Yes.

MR. POWERS: I would like to offer this in evidence, please.

XXX (Plaintiff's Exhibit 26 marked for identification.)

MR. COOPER: Your Honor, again I have no objection to this document as containing anything damaging to my client, but I do object on the grounds of relevancy.

THE COURT: I am not going to receive this because certainly on this record--who is Matthew Silverman, Mr. Frankel?

THE WITNESS: He is a partner of the law firm of Robinson's.

THE COURT: I gather what happened here was you

asked him to write this memo, right?

THE WITNESS: I had had a report concerning a problem with the Insurance Department of the State of New York by the Faggen firm, arising out of the Mason Tenders Union, and I had asked him to write me a report indicating what the problem was, and that investigation occurred prior to the merger with Titan, and had not shown up in any of the documentation which I had received from the Robinson office as part of the closing documents of the Faggen transaction or any of the documents that are now in evidence, such as the Exhibits 1, 2 and 3.

THE COURT: I am going to sustain the objection. This is going way too far. If you look at the contents of that report, there is information there which establishes to my satisfaction, at least, that this is going way out of bounds of this lawsuit.

MR. POWERS: If you will recall--

THE COURT: I don't want to get a lot of argument from you. The time is past for that. This is an internal report he sought. By its very terms, it isn't relevant to this lawsuit.

Let's go on. Is there anything else?

Q Mr. Frankel, when was the next conversation you had with Mr. Faggen concerning his employment or his earnings?

A In December, as you recall, his contract expired.

THE COURT: December of what year, sir?

THE WITNESS: 1971.

A So I had entered into an arrangement with Mr. Faggen that he would be continued on a month-to-month basis in accordance with the terms of his original employment agreement, and we each had the right to terminate that on 30-days' notice.

This was an oral agreement that was subsequently continued for a period of time. At the December meeting, we had also received some projections from Harold for the year 1972, which were very promising projections, that he was getting the data processing under control, he expected to get a new data processing account which would have been a very substantial fee, which would have paid for a lot of the on-going costs, and he was anticipating that he was going to have a turnaround in 1972, so that the company would improve.

The next matter I had with Faggen was, when I got the first quarter earning report of his division, I wrote him a letter by registered mail on May 3rd, 1972, in which the earnings for the first quarter showed a loss of $22,000, which was an overall reduction from the first quarter of the prior year of $101,000, and I indicated to him in the letter that this was substantially different than he had reported to the board in the December meeting, and I wanted an explanation of it.

Q What response did you get from Mr. Faggen?

A Mr. Faggen at that point had just prior to that point been operated on, so he was recuperating from his surgery, and I got a letter from Rose Dogan on the 15th indicating that her husband wasn't well enough yet and that she was servicing clients and was very busy, and she didn't have the time to provide the information that I requested. Also, I got a letter from Harold Faggen on the same date saying that he was returning to full employment, but he now required back-up management for his division from Titan, and he would not project a profit for the year 1972, and he was concerned with his being removed from the board, which action had been taken in April pending the annual meeting of stockholders, which takes place in May.

Again, the same issue he had raised the previous year, but by this time I had control of the board and we effectively removed him from the board.

MR. POWERS: No further questions, Mr. Frankel.

CROSS EXAMINATION

BY MR. COOPER:

Q Mr. Frankel, this lawsuit was commenced in May of 1972, was it not?

A Yes.

Q The meeting at which you described Mr. Duthie and

Mr. Rosenfeld and yourself, meeting with Mr. Faggen, was prior to the board meeting of May 1971, at which time there was a discussion between you in which the bonding capacity came up; do you remember that?

A (Pause.)

MR. COOPER: By the way, I see you are referring to notes constantly. May we mark that for identification, please?

XXX (Defendant's Exhibit Q marked for identification.)

MR. POWERS: Is there anything in the file except those notes, Mr. Frankel?

THE WITNESS: No.

Q Mr. Frankel, prior to this, I had asked you a question about the meeting with Messrs. Duthie, Rosenfeld and yourself prior to the board meeting of May 1971. Do you remember that question that I asked of you?

A I remember the question. I don't remember saying anything to that on direct examination.

Q Did you have a meeting with Mr. Faggen and Mr. Rosenfeld and Mr. Duthie and Mr. Robinson prior to the board meeting of May, I think it was May 1-, 1971? That was the special board meeting.

A Without referring to my records, I could not recall at the moment.

Q You did say that you met with him prior to the board

meeting, did you not, met with Mr. Faggen prior to the special board meeting?

A Are you talking about at the time that I was being nominated to the board?

Q No, no, no. We are now into the May 1971 board meeting. Just to refresh your recollection, that first board meeting had been called, there had been a non-payment of the interest due and you called a special meeting of the board. Do you recall that testimony?

A Yes, I do, now that I see my memo on it.

Q At that time, I think you testified on direct that there had been a discussion with respect to the bonding ability of Sovereign, and that was one of the problems that had come up at the meeting, isn't that so? In other words, if the interest was paid to Faggen, the cash position of Titan was such that it might make it difficult for the construction companies to get the necessary bonding that they required. Do you remember that testimony?

A I remember the testimony with respect to the fact that the balance sheet of Titan did not produce sufficient net quick assets because of the liabilities that were generated on it, and the frozen assets, that the bonding companies wouldn't authorize the extent of bonding power needed to operate the Titan construction divisions, yes, sir.

Q What I am specifically addressing myself to now, Mr. Frankel, is the conversation that took place between yourself--that is, Mr. Duthie, Mr. Rosenfeld, Mr. Robinson and Mr. Faggen--prior to that board meeting dealing with certain statements that were made, and, specifically, do you recall anyone at that meeting making the statement that, "I'll get mine out before you get yours"?

Do you remember anybody making that statement to Mr. Faggen?

A A statement of that effect was made by Mr. Duthie to Mr. Faggen.

Q And Mr. Duthie was at that time who?

A He was the division president of Stewart Mechanical Corporation of Louisville, Kentucky.

Q Is he presently the president of the company?

A He is not.

Q What is he?

A He is the chairman of the board of Stewart at this time.

Q Was he the president of Titan?

A Duthie was the president of Titan at that time.

Q He was?

A In 1971, yes, he was. He was the president and chief operating officer.

Q Did Mr. Duthie also make the statement that, "We will reduce this corporation to a shell"?

The quote is, page 438-A of the appendix:

"We get out ahead of Harold, we can row like hell and leave Harold with a shell."

Was that also Mr. Duthie's statement?

A I think Mr. Duthie did make that statement.

Q Was this statement made by you:

"We in construction do not intend to work for Faggen. Unless you change your position from creditor to stockholder, we will defeat your claim by borrowing as heavily as possible, selling out, and leaving you with a shell."

A That was not my statement. I note that record says it is my statement, but that statement was also made by Mr. Duthie.

Q It was right after that statement was made that you had the board meeting and announced that the interest had not been paid, right? That was the board meeting of May 13.

A That is correct.

Q And, then, following that meeting--by the way, at that meeting, do you recall Ed Kaufman being present?

A I would have to look at the board minutes, but I could tell very quickly. I have the board minutes when he was present.

MR. COOPER: Will counsel concede Mr. Kaufman was present at that meeting?

MR. POWERS: I don't know.

MR. COOPER: Okay.

THE WITNESS: I can tell you in just a second.

A Yes, he was.

Q Did Mr. Kaufman--do you recall any comment by Mr. Kaufman with respect to your announcement that you weren't going to pay the interest on the notes?

A I don't recall any specific statement made at this time.

Q If I told you that Mr. Duthie has testified under deposition in this case, page 21 and 22, of Mr. Duthie's deposition, Mr. Powers--this is a question of Mr. Duthie, this is only for the purpose of refreshing your recollection, Mr. Frankel.

"Q Do you know the notes were not paid on the due date? I mean the interest on the note was not paid on the due date of the note in 1971.

"A Yes, I think subsequently they were paid shortly thereafter.

"Q Yes, they were. But do you recall any discussion at the time that the notes were not paid and what you said to Mr. Frankel or to the members of the board?

"A No.

"Q Do you recall what Frankel said?

"A No.

"Q Do you recall what Mr. Kaufman said?

"A No, I don't. I recall Mr. Kaufman, I think, recommending that they be paid, also."

Now, do you recall--does that refresh your recollection as to whether Mr. Kaufman at that board meeting of May 1971 recommended that the notes be paid?

A That does not refresh my recollection. I am looking at the board meeting minutes to see if there is any reference to that in the board minutes of the meeting, and I don't see any reference to that in the minutes of the board meeting, either.

I have no recollection at this moment that Mr. Kaufman recommended it be paid. I do know Mr. Robinson wrote me a letter recommending that it be paid.

Q Do you also know that Mr. Kaufman -- by the way, Mr. Kaufman, in May of 1971, was not a candidate for reelection to the board for the next year, was he?

A No.

Q Now, then, notwithstanding the fact that he was not a candidate for reelection, he resigned, didn't he, between May 13 and May 26, of 1971?

A Well, he resigned after the caucus indicated to him he was not going to be reelected, so he did resign, yes.

Q And at the time of his resignation he sent a letter, which is, I believe, at page 422-A, dated May 18, and do you recall--would this refresh your recollection as to whether Mr. Duthie was correct as to what Mr. Kaufman said at that meeting. In that letter, he says, "Further, I was surprised at the sudden and abrupt calling of a board meeting last week, and particularly at what would appear to be a decision made with respect to the convertible subordinated debentures, with which I was in certain disagreement."

Now, does the combination of Mr. Duthie's testimony and Mr. Kaufman's letter refresh your recollection as to whether at the board meeting of May 13, 1971, that he raised objection to the non-payment of the interest on these notes?

A Is that letter addressed to me, sir?

Q That letter is addressed to Mr. Robert J. Frankel, Chairman of the Board, Titan Group, it's May 18.

A I don't recall it at this time.

MR. POWERS: I show you a copy of it.

(Pause.)

A Now that I read it, I do remember receiving this letter, and he does have that statement in there but, basically, this letter was written for a different purpose.

Q Whatever the purpose, I am only asking you now--

A Yes, I do recall it now that I have seen it.

Q Now, Mr. Frankel, at the same meeting in May of 1971 you had begun your attack on Mr. Kaufman, had you not?

A Yes, I had.

Q And you were accusing Mr. Kaufman of conflict of interest and breach of fiduciary duty in connection with the Yosemite transaction, correct?

A Yes, I did.

Q And at that time, when you were making these charges against Mr. Kaufman, he was at the board meeting, was he not?

A Yes, he was.

Q So, at the May meeting Mr. Kaufman, while being charged with this Yosemite transaction was also taking issue with what you proposed to do with the Faggen notes, correct?

A I don't think I was making friends.

Q Okay, but the answer to my question is "yes"?

A Yes.

Q Between May of 1971, at which time these threats were made to Mr. Faggen, and September of 1971, you stated you had met several times with Mr. Faggen in connection with an attempt on your part to try to get him to restructure the notes, right?

A And with his counsel. We had roughly, over a period

of a year, I think nine different proposed methods of restructing those notes.

Q And I don't know whether we will have the time to get back to that or not, but, right now, I want to deal with another subject on that, Mr. Frankel.

On the meeting of September 13, 1971--that's the board meeting--was that September 13 or September 14? September 14. The September 14 board meeting, that was the meeting at which you asked the board for authority to sue Kaufman on the Yosemite transaction, isn't that so, and I believe the board did not give you specific authority to do it?

A I would have to refer to the board minutes for verification of that. At some board meeting, around that time, I had asked for that authority, and I was given limited authority.

Q Page 458, Mr. Powers.

A I have the board minutes here if you want.

Q I have the extract as part of this record, it's in evidence, and let me refresh your recollection:

"The chairman reviewed his investigation with respect to the position of Irell & Manella in the Yosemite transaction as well as the claim by that firm for unpaid legal services represented in part by a promissory note of this company held

by it. The Chairman posed a series of possible moves and requested consideration by the board on each.

"A discussion followed after which, pursuant to separate motions and separate votes, it was decided if the company is sued by Irell & Manella the company will defend. If sued by Irell & Manella, the company will defend and counter sue. The company will not initiate action against Irell & Manella. The vote with respect to each of the foregoing was unanimous except as to the vote with respect to initiating action against Irell & Manella, where the Chairman recorded his vote in favor of initiating such action, all other directors voting in the negative."

Does that refresh your recollection of what happened at that meeting?

A That is a correct reading of what transpired.

Q At the same meeting you submitted the complaint, which is now in evidence, that had been drawn by Mr. Sidney Silverman against Mr. Robinson and Mr. Faggen, isn't that true?

A I read the complaint.

Q You read the complaint?

A I discussed it with the board members, yes.

Q And at that time you made the statement that the purpose of this complaint was to compel somebody to negotiate who refused to negotiate, and you wanted Ben Robinson to

intercede in that connection, isn't that so?

A I don't think you will find that statement in the minutes of the meeting. What happened at the meeting, when I read that complaint, was that Mr. Robinson threatened action against the directors if the complaint was filed. He threatened to sue them personally for grounds that he stated at the meeting.

Q Let me read you from the minutes, page 459:

"The Chairman then described his efforts to convince Mr. Faggen to restructure his interest in the company. He commented on the effect of the debentures on possible merger, bonding capacity and profit position. He stated that as a result of Mr. Faggen's refusal to consider such restructuring the executive committee had caused an investigation to be made to determine whether or not there was some basis for setting aside the transaction in which the debentures had been issued. The records of the transaction contained in the Company's home office were delivered to Sidney Silverman, an attorney in the State of New York who had been engaged as independent counsel, and who wrote to the Chairman expressing an opinion that based upon his examination of such records the Company had a meritorious claim against Messrs. Faggen and Robinson.

"The Chairman then read a proposed complaint against

Messrs. Faggen and Robinson, prepared by Mr. Silverman."

Does that refresh your recollection as to whether or not this complaint was composed for the purpose of compelling someone who wasn't going to negotiate to negotiate?

A I think if you read the next part of that statement you will find that Mr. Robinson made that statement, not me. Mr. Robinson, if I may quote it, says, "Mr. Robinson vigorously defended the statements of the complaint and the threat of litigation, complaining that he was being joined as a proposed defendant solely for the purpose of seeking to cause him to put pressure on Mr. Faggen to accept some restructing of his debentures."

Q Is it your statement, Mr. Frankel, that that was not the purpose of that proposed complaint?

A The purpose of the proposed complaint was to initiate litigation against Mr. Robinson and Mr. Faggen for what, as chief executive officer of Titan, I considered to be an improper transaction. That determination by me wasn't based on any knowledge of Section 10(b)(5) of the S.E.C. laws because I had no familiarity with that at all. That was based on a simple business transaction where I had received from Mr. Robinson the memorandum that had been prepared by Mr. Faggen, which has been called the selling memorandum here, setting forth certain numerical earnings capacity plus potential, and

I had the actual figures which were nowhere near the projected earnings capacity. And the deal looked bad to me, and I was very concerned with the fact that this had always been known as a Ben Robinson deal and that it was a relationship which, prior to merger, there was no evidence of any disclosure to the board or to any of the people who were responsible for this transaction of the very intimate relationship between Ben Robinson as attorney and Harold Faggen as client. It was my opinion that this transaction should have been rescinded, or there should have been an adjustment. I had worked very hard to try to structure an adjustment. It didn't work out. In fact, we reached the point where we had almost a closing and that fell ten minutes before we were to meet to close.

MR. COOPER: I move to strike all of that, your Honor, as not responsive to my question.

THE COURT: I am frank to say I had forgotten your question at this point. I will have to have it reread to me.

MR. COOPER: All right.

Q Mr. Frankel, in any case, at the September 14 board meeting, having read this complaint to the board, the complaint was never served, was it?

A The complaint was never served because--

Q That's the answer. All right.

A That complaint was never served.

Q That is correct, that complaint was never served, right?

A Yes.

Q In November of 1971, there was another due date for interest, wasn't there?

A Yes, there was.

Q On that due date interest was paid, was it not?

A Yes, but there is an explanation of that.

Q All right. Now, then, Mr. Frankel, at or about the meeting of September 1971, after that meeting you had read that letter from Mr. Silverman, had you not, which is now part of the evidence in this case?

A Are you talking about the meeting of September 1971?

Q September of 1971, Mr. Silverman had gotten into a dispute with Mr. Kendis, and he sent a letter, and his attorney has got that now. That was the letter in which he said no 10(b)(5) action would lie in this case, do you remember that?

A There was an opinion letter given by Mr. Silverman which our general counsel from Cleveland, Mr. Kendis, took exception to, explaining the procedure should have been under Section 10 (b) (5).

Q My question to you, Mr. Frankel, is that at that time you were advised by Mr. Silverman what would be required for a 10(b)(5) claim, were you not?

MR. POWERS: I object. We are going afield now into lawyer-client material. The letter was permitted into evidence. I don't think we should have evidence on conversations.

THE COURT: It strikes me as being a little bit odd coming from you, since we have already gotten into that a good deal, partly through your efforts. I will allow it.

MR. COOPER: The Silverman letter is Exhibit H in evidence, your Honor.

THE COURT: All right.

THE WITNESS: Could I have the question read?

MR. POWERS: Could I state on the record the previous testimony on this was at an open board meeting where Harold Faggen was present, and the last question was addressed to a conversation strictly between Mr. Frankel and the lawyer.

THE COURT: Strictly between Mr. Frankel and what?

MR. POWERS: And the lawyer, Mr. Silverman.

THE COURT: You may be right, but this is cross examination, Mr. Powers, and here credibility, as I understand the system, is one of our principal queries by use of cross examination.

I remember you were seeking to have it pertinent to direct examination. Perhaps you are right, but I think I am more likely right in what I say about cross.

Now, let's go ahead. Let's not quibble about this one.

Q Mr. Frankel, do you recall sending to Mr. Kaufman this letter, which I will ask it be marked for identification.

XXX (Defendant's Exhibit R marked for identification.)

THE COURT: While you are looking at that, Mr. Frankel, we will take a short recess.

(Recess.)

MR. COOPER: Your Honor, this is offered in evidence without objection by the plaintiff.

XXX (Defendant's Exhibit R received in evidence.)

Q Mr. Frankel, reference is made in Exhibit R to the fact that you had met with Mr. Kaufman on September 29, and then asked to meet him on Monday, October 18, at which time you had made inquiry of him as to the basis of the evaluation of the Faggen Companies resulting in the payment of $5.5 million of convertible 4-1/2% debentures.

You then go on to ask--

"We shall be advised as to who made that determination and whether or not there was some sound basis for the financing of the purchase price, such as the value of the assets owned by Faggen's corporations, the amount of liabilities offset, the then current earnings, the projected potential earnings, the then investment view of interest and data

processing and similar companies (earnings multiple) as well as the then present value of 4% restricted marketable debentures payable in annual installments, commencing on June 7, 1974, of $1,100,000 each."

Now, you met with Mr. Kaufman, did you not?

A Subsequent to this letter.

Q And you met with him on October 18, did you not?

A I don't know whether it was October 18. It was shortly subsequent to this letter.

Q And he did deliver this information to you?

A No, he did not.

Q Did he give you any information at all?

A He described the transaction, and he went into the negotiations which have heretofore been testified to in this hearing.

Q In other words, what you are saying is he went into essentially the same kind of detail that he testified to here, is that what you are saying?

A Well, he didn't have documents with him. At a meeting that we had, I believe at the Tuscany Hotel in New York where he was staying, it was a dinner meeting, and he was generally giving me the substance of what he testified to with respect to how the deal came about, what Ben Robinson's position was in the deal, how the papers were drafted, how he had negotiated

the price based on certain documentary information that he had used to evaluate the companies, but he didn't have any of that information with him.

Q Even though you had requested this of him as early as, I believe, the letter was October 5?

A You have got to remember, Mr. Kaufman and I were in a bit of a hassle at that time, so he wasn't giving up information to me as easily as somebody who I would consider to be on the Titan team.

Q But, on October 18, you settled your claim with Mr. Kaufman, didn't you?

A It was in that area that I settled it with Mr. Manella of Mr. Kaufman's office, Arthur Manella, not with Mr. Kaufman.

Q You met with Mr. Kaufman on October 18?

A In New York.

Q You had a board meeting on October 19?

A Yes.

Q And at the board meeting of October 19, you announced the settlement of the Irell & Manella claim?

A But the settlement of the Irell & Manella claim was with Mr. Manella, not with Mr. Kaufman. Mr. Kaufman wasn't happy about it.

Q The settlement was made October 18?

A No, the settlement was made in Los Angeles, not in New York.

Q Before October 18?

A I can't remember the exact date. It was in that period. You had some papers at the deposition which would show it.

Q What I am getting at is that I show you these--

MR. COOPER: I would like to mark this for identification.

XXX (Defendant's Exhibit S marked for identification.)

Q I show you the minutes of October 19, 1971, page 3. This meeting was held at Fort Lee, New Jersey. I show you page 3 of the minutes of Exhibit S for identification. First, I ask you if this is a true copy of those minutes?

A Of the minutes here.

Q First, I want to get it in evidence, so tell me if that is a true copy of the minutes.

A It appears to be. I have checked the first three pages and it appears to be.

MR. COOPER: I offer that in evidence, if your Honor pleases.

MR. POWERS: No objection.

XXX (Defendant's Exhibit S received in evidence.)

Q Mr. Frankel, you will observe that on page 3 of those

minutes, it states: "The Chairman described his negotiations with Mr. Kaufman of the firm of Irell & Manella, resulting in an agreed settlement of all claims by that firm for unpaid attorneys' fees and advances, and calling for the exchange of mutual release upon the issuance by the company of 10,000 shares of its capital stock to Irell & Manella, and the payment of out-of-pocket advances of approximately $3,000. The board ratified the settlement described by the Chairman and commended him for his efforts and the results achieved."

Do you recall that that was the date and that was what the board did?

A Yes, but the settlement wasn't actually consummated until December 1971.

Q I know that, but, as of October 19, you had agreed with Mr. Kaufman on the terms that you were ultimately going to put down into formal agreement, right?

A That's what the minutes say, but the actual physical settlement agreement which took place in Los Angeles, California, was with Arthur Manella, and Mr. Kaufman was not in the room at the time of the final settlement agreement, and while the board minutes say that Mr. Kaufman, I think that was just to be gentle on Mr. Kaufman.

Q Are you suggesting, Mr. Frankel, that you had met earlier than October 18 with Mr. Manella and settled this case

with him out in California?

A Yes. Settled the Kaufman problem. It was not in litigation.

Q Right, you settled the Kaufman problem sometime between September 14, 1971 and October 18, 1971, out in California with Mr. Manella?

A Correct.

Q So that when you met with Mr. Kaufman on October 18, 1971, at the Tuscany Hotel in New York, you had already reached an agreement with respect to your settlement, isn't that so?

A That is correct. With respect to the settlement with the firm.

Q With the firm.

A Yes.

Q And you were calling upon Mr. Kaufman at that point and your letter deals with the information that you wanted on Faggen?

A A request for factual information, that is correct.

Q Right. Now, this was after you had settled with Manella?

A We had not signed the documentation at that point.

Q I understand that. Well, did Mr. Kaufman respond to you and tell you what he thought the present value of the 4%

debentures were worth when he made this deal?

A He did not do that. He and I did not have what you would call really friendly relations at that meeting. They were cordial relations.

Q Mr. Frankel, in 1969 your company became a part of Titan, right?

A Correct.

Q In 1970, Titan was undergoing a severe liquidity crisis, correct?

A Yes.

Q You became a member of the board sometime in April 1970?

A At the annual meeting of stockholders, which I believe was in May of 1970.

Q Now, then, demands were being made upon you by Mr. Kaufman, who was then chairman, for cash for Titan, right?

A That is correct.

Q You refused to make any cash payments to Titan during 1970, isn't that so?

A That is not correct.

Q When did you make your first cash payment to Titan?

A I have a schedule of cash payments to Titan some place.

Q Let me withdraw that for the moment, Mr. Frankel.

A I have it right here. In 1970, we transferred $150,000 to Titan.

Q When?

A I don't know the specific date. It was sometime during the year 1970.

In 1971, we transferred--

Q I am not interested in 1971 for the moment. I am only interested in 1970, before you became chairman.

Do you recall testifying under deposition that although demands were being made upon you for transfers of funds that you refused to make those transfers because you were afraid that Titan was going to go under?

MR. POWERS: What page?

A I believe I did testify on depositions to that effect. I don't remember the exact language. That was my fear at the time.

Q So that at the same time that you were not making payments, Faggen had paid $750,000 into Titan, had it not, during 1969 and 1970?

A I had no knowledge of that in that time. You asked me a question about what Sovereign was doing. Sovereign had--from 1969 when we were acquired--

Q I didn't ask about Sovereign now. I am asking you about whether you knew that while Titan was undergoing this

severe liquidity crisis, which was bringing it to the threshhold of disaster, as you described it, Titan already taken out of the Faggen Companies not only the $750,000 in cash but they had already taken out the $1.3 million in securities. Isn't that so?

A I had no knowledge of that, and except for what I have heard testified here, which was produced after this litigation, I had no knowledge of that.

Q But you have since learned that to be the case, right?

A I don't know whether it was transferred by 1970 when you are talking about.

Q Did you read Mr. Hatcher's affidavit before you testified? Did you read his affidavit?

A No, I did not.

Q Do you deny the money was transferred?

A I don't know. I have the report of what money was transferred. If you want me to put that into evidence, I can do that. I now know what money was transferred to Titan by the Faggen Companies and what money was re-transferred back to Faggen.

THE COURT: Mr. Cooper, would you brook an interruption here for lunch. I want to deal with a jury which is deliberating. We will resume at 2:15.

AFTERNOON SESSION

2:15 P.M.

R O B E R T J. F R A N K E L, resumed.

CROSS EXAMINATION CONTINUED

BY MR. COOPER:

Q Mr. Frankel, as a result of the crisis which developed in the latter part of 1970, you threatened to rescind your transaction with Titan, is that correct?

A Yes.

Q That threat ripened into a claim against Titan to rescind your transaction, right?

A That's correct.

Q And that claim was generally settled with Titan whereby you were issued an additional 350,000 shares of Titan in lieu of your rescission?

A I was issued the down-side shares and the earn out shares under my agreement. I was not issued any shares in excess of what the original agreement called for.

Q In either case, neither the earn out shares or the down-side, had yet been reached at the time that you made your settlement, isn't that so?

A A portion of them had been reached.

Q So that as of the date of your settlement, which would have been in the latter part of 1970 or the first part

of 1971, your 150,000 shares had now been converted to some 536,000 shares?

A I had an earn out prior to that so that it was prior than the amount you are talking about, but the fact is that that was part of the transaction in which I agreed to assume the chief executive officer's position to attempt to get control of the finances of the company.

Q So that what you are saying is that you exercised in a sense an option to in lieu of rescinding the transaction, and with knowledge of the fact that Titan was undergoing a very severe financial crisis, you opted into the company rather than out of the company?

A It was a disputed claim, it wasn't a claim the other side readily agreed to. So, on the advice of my counsel, Mr. Sheib, I agreed to accept the shares in lieu of leaving the company. I was already in the company, so it was not like I had an open door that I could walk out without a dispute.

Q That is not my question, Mr. Frankel. What I am asking you is, you had notified the company that you wanted to rescind and told them you were going to rescind, right?

A Yes, I did.

Q And as a result of that notification, you then entered into negotiations with Titan whereby instead of rescinding you opted to take additional shares?

A And additional responsibility.

Q Yes.

A Yes.

Q And that was all conducted at the time with Mr. Kaufman?

A That was conducted with Ben Robinson, and a committee that was set up by the board of directors, of which Ben Robinson was the head of the committee.

Q Didn't you testify in your deposition that these negotiations were conducted by Mr. Kaufman?

A There was a three-man committee.

Q Who were they?

A I would have to look it up, but I believe it was-- I can look it up, it's part of the board minutes. They appointed a committee to negotiate it.

Q Wasn't Mr. Kaufman one of them?

A I don't recall. He may have been, but the record will show exactly who was on the committee. I think Bob Doll was on the committee, as I recall. He was an attorney from Louisville.

Q Mr. Frankel, you had originally had 150,535 shares, and you got an additional number of shares so that you received in total 536,248 shares, correct?

A But the earn out for the year 1970 had not been

determined, and we earned pre-tax income of $1,260,000 in Sovereign in that year, so that that would have in effect reduced the total number that would have been issued to me. I would have had some of those shares in any event.

Q The question, Mr. Frankel, in your deposition on page 19 was:

"Q How many shares did you receive in connection with the settlement of that rescission claim?

"A I ultimately had 436,248 shares. I don't quite remember how many I received initially. But the difference between what I received (150,535) initially and 536,248 shares was what I received at that time."

Do you remember that question being asked and that answer being given?

A I do, and that answer is correct, but it does not take into consideration there had been no adjustment for earn out shares for the year 1970, which would have been incorporated in that additional number of shares.

MR. COOPER: I move to strike out all of the answer after the one part responsive to my question as to whether that was the question asked and the answer given.

THE COURT: All right.

Q Mr. Frankel, with respect to Mr. Duthie and Mr.

Rosenfeld, who were two of the persons who participated with you in these meetings with Mr. Faggen during 1971, was there anybody else who was present aside from yourself, Mr. Duthie, Mr. Rosenfeld, perhaps Mr. Robinson? Was there any other director present at any meetings that you had with Mr. Faggen during the period of time that you were attempting to get him to restructure his notes? That would take us from, let's say, March of 1971 up until the end of 1971.

A The statement of fact in your question is incorrect.

Q Did you meet with Mr. Faggen, Mr. Duthie, Mr. Rosenfeld, in March of 1971?

A Only at the board of directors meeting.

Q Did you have a private meeting with Mr. Duthie and Mr. Faggen and Mr. Robinson prior to the board of directors meeting in May of 1971?

A Do you mean immediately prior to the meeting?

Q Yes.

A That could be possible, but not--that was not a private meeting where the four of us were together. We might have had a meeting with Mr. Robinson and Mr. Rosenfeld and Mr. Duthie and myself, but the meetings that you are referring to were meetings between Mr. Duthie, Mr. Rosenfeld and Mr. Faggen. I was not present at those meetings.

Q Those are the meetings that occurred in August or

September of 1971?

A That is correct.

Q And were those meetings held pursuant to your instructions?

A They were.

Q Was there anybody else that you designated to meet with Mr. Faggen other than Mr. Duthie and Mr. Rosenfeld?

A I had previously, previous to September, requested Mr. Robinson, who seemed to be the logical intermediary, to meet with Mr. Faggen, because he was close to both of us.

Q Aside from Mr. Robinson and Mr. Duthie and Mr. Rosenfeld, was there anybody else that you had designated?

A There was not.

Q Now, then, in 1972, there were transactions entered into between Titan and Messrs. Duthie and Rosenfeld, were there not, in connection with certain stock?

Specifically, I am referring to board minutes of April 6, 1972, which I would like to offer into evidence at this time, your Honor.

MR. POWERS: Your Honor, I object to this inquiry on the grounds of relevancy.

THE COURT: Let's mark the exhibit for identification.

XXX (Defendant's Exhibit T marked for identification.)

THE COURT: What's the purpose of offering this?

MR. COOPER: The purpose is to show the transactions between Titan and Messrs. Duthie and Rosenfeld occurred in April of 1972, in which they received substantial benefit, and to demonstrate that these--

THE COURT: Let's assume that Duthie and Rosenfeld did, is that really relevant here? I don't understand.

MR. COOPER: Only on the question of what they got for attempting to coerce Mr. Faggen into restructuring these notes during these meetings which Mr. Frankel arranged.

MR. POWERS: Your Honor, if he wants to show coercion, I offered to bring these witnesses to town and he said he didn't need them.

THE COURT: Please, Mr. Powers, that is not the question before the house.

Well, there is some reference here to the Faggen transaction, too, I see.

MR. COOPER: Yes, your Honor.

THE COURT: I will allow it, particularly because of the latter reference, and I will include that business which you think is important.

It will be received.

XXX (Defendant's Exhibit T received in evidence.)

Q Mr. Frankel, you have before you a set of the minutes, do you not, of April 6, 1972?

A I do.

Q You will notice that on page 7 of those minutes there is reference to the recommendation by Mr. Powers to file a complaint against Mr. Faggen at that meeting.

A Yes.

Q And that meeting occurred approximately one month before the institution of this action, which was in May of 1972, correct?

A Yes.

Q At that same meeting, there is reference on page 2 to Mr. Duthie's claim with respect to additional shares and reference is made to a meeting of the executive committee. Do you see that paragraph that says, "The Chairman advised that the executive committee, after extended negotiations with George Duthie and Patrick King, recommended to the board of directors the settlement of their claim that the corporation had failed to comply with the provisions of the agreement covering the acquisition of Stewart Mechanical Enterprises."

Do you see that language?

A Yes.

MR. COOPER: Will counsel concede that when requested for copies of the executive committee meeting that there were no executive committee minutes for that meeting?

MR. POWERS: Conceded.

Q Do you know whether Mr. Duthie at any time prior to this meeting ever demanded registration of any shares?

A Both he and Mr. Windhorst of Ready Electric had made written demand for registration of shares.

MR. COOPER: Again, in our letter requesting these documents, Mr. Powers, I requested any documents relating to any claims made, and no such document was submitted to us. Is that correct?

MR. POWERS: That's correct. I couldn't find any, and the closest thing I have to it is a lawyer's letter between the two lawyers which refers to the demands but is after the date. If you find that helpful, I brought it with me today.

MR. COOPER: Will counsel concede that prior to April 6, 1972, at the time of this board meeting, there was no--or you had been able to find no written demand for registration of any shares?

MR. POWERS: I couldn't find any written demand in any of the files I had.

MR. COOPER: And you requested them also of Titan, did you not?

MR. POWERS: I assumed that Titan had sent me all the material. You may want to ask Mr. Frankel again.

MR. COOPER: I want to speed this up, if I can.

Q Mr. Frankel, do you have any record prior to the board meeting of April 6, 1972, in which Mr. Duthie informed Titan of any obligation to register those shares?

A I do, and there are extensive correspondence between the attorneys for Mr. Duthie and Mr. King, who is his partner, and our general counsel, who was not Mr. Powers at the time, plus myself, pertaining to this issue, and it extended for well over a year.

Q Did you ever ascertain the cost of filing a registration statement as opposed to the cost of issuing additional shares without consideration?

A There was in my opinion adequate consideration for issuing the shares which--

Q Just a moment. My question is simple, and I wish you would answer the it.

A I did investigate the cost of a registration, and I did investigate very thoroughly the merit of their claims. I had advice of a very competent counsel, and we proceeded to act on the advice of that counsel because these men were sorely needed in the management of Titan, and the settlement that was arrived at was in our opinion a favorable settlement to Titan or it wouldn't have been arrived at.

MR. COOPER: I move to strike all of that part of the answer as not responsive.

THE COURT: Yes.

Q When the settlement agreement was finally made, they received approximately 80,000 shares of Titan stock, is that correct?

A Which they would have received--

Q Just answer my question. They received 80,000 shares of Titan stock, right?

A Yes, but they were entitled to receive it under their agreement.

MR. COOPER: Again, your Honor, I move to strike.

THE COURT: Yes.

Q Mr. Frankel, at the same time you settled this claim for the 80,000 shares, you provided for the sale to Mr. Duthie and King of certain real estate that had been owned by Titan, is that correct?

A Yes.

MR. POWERS: My relevancy objection continues, of course, your Honor.

THE COURT: Yes.

Q In return for the transfer of the real estate, they transferred to Titan 41,000 shares to Titan, is that correct?

A I don't know the exact number. It's in the area of 41,000. I think it's a more specific number than that.

Q 41,605 shares.

A That sounds more like it.

Q Were the 41,605 shares turned over by Duthie to Titan, were those restricted shares?

A I don't know whether they had a letter of release on those shares or not at the time. Sometime along the route, they had a letter of release on some of their shares. I can't recall the specific relationship in time.

Q With respect to the Rosenfeld transaction, which also occurred at the same meeting at which this lawsuit against Mr. Faggen was approved, they were entitled up to 100,000 additional shares of Titan and based upon the earnings of the Multiplex Division, weren't they?

A 200,000.

Q 200,000?

A Yes.

Q And do you know what the formula was for their earnings per share?

MR. POWERS: Same objection on relevancy, your Honor.

THE COURT: I can see some relevancy. However, I sympathize with what I deem part of Mr. Powers' objection, and that is to go into all this clinical detail. I just don't see the point. Generally, I see the point, but why all the clinical detail.

MR. COOPER: Let me see then if I can speed it up,

Judge.

Q Under paragraph 4-C of the Multiplex agreement, Mr. Frankel, Multiplex was to receive one share for each $33.00 by which Multiplex earnings exceeded $5,650,000 in the six years ended December 31, 1974. In other words, the $400,000 couldn't be achieved until Multiplex had earned $8,950,000 or $3.3 million over and above the $5.6 million. Do those numbers seem to fit your recollection?

A Frankly, no. I would have to sit down and study that all over again. I knew it at the time, but those--there are just too many numbers in my head these days for me to remember that.

Q Do you know what the earnings of Multiplex were at the time of the settlement?

A I do.

Q What were they?

A I don't recall at the moment. We have complete records on this.

Q They had not reached the earn out figures, had they?

A The Multiplex Company has been--the sale of the Multiplex Company has been rescinded, and we have all of their shares back.

Q At the time, however, in April of 1972, the earn out figures had not been reached, had they?

A The earn out figures had been very substantial, but the total earn out had not been reached.

Q Did they ever make a demand in writing and based upon their claim?

A Yes, they did. Their attorney made a demand in writing.

Q At the time part of their claim was based upon services which had been rendered on behalf of Titan by Mr. Rosenfeld and Mr. Marmorstein, is that right?

A Excuse me, I missed that question. Could that be read back to me, please?

MR. COOPER: Yes.

A Multiplex management consisted of four executives. I had pulled two executives out of the company for a period of two years.

Q So we can move this along--

THE COURT: I think, Mr. Cooper, in fairness to Mr. Frankel, you have got to put a different question. We can go on forever in this lawsuit with these details.

Now, you surely have something in mind specifically. Let's hit it once and drop it. We have gone into Multiplex ad nauseam.

MR. COOPER: I'm sorry, your Honor.

THE COURT: Let's not overdo this.

MR. COOPER: All right.

THE COURT: You have something in mind. Hit it.

Q Mr. Frankel, if you will take a look at the minutes, page 3, the language is, "The former shareholders of Multiplex had asserted that the diversion by Titan of Rosenfeld and Marmorstein primarily together with certain other key employees of Multiplex from the business and affairs of Multiplex to render extended and continuing services to Titan during substantially all of 1971 had materially impaired Multiplex's earnings during the said three-year period and would also necessarily reflect unfairly on the six-years earnings. In satisfaction and compromise of such claim, the executive committee recommends that Titan release the 100,000 shares of Titan."

Now, specifically, did anyone ever analyze, were there any time records kept of the time spent by these executives on behalf of Titan?

A Absolutely.

Q Do you know that Mr. Rosenfeld has testified that there were not?

A I don't care what Mr. Rosenfeld testified to. He wasn't keeping the time records. My office was keeping the time records, and I can establish exactly what Mr. Rosenfeld did on behalf of this company, and I can establish what Mr.

Marmorstein did, and between them and a couple of other key executives, this hotel company is alive today. We sold off hotels losing money, we saved the Yosemite Company which was in default on a $5,000,000 default at the time we took over management, and that project is now favorable.

MR. COOPER: I move to strike the answer.

THE COURT: I am sympathetic, because to get into these matters almost invites this argumentation in the form of an answer. I think we either have to make up our minds we are going to drop this or else you are going to have to accept some of this argumentation, because your questions sort of allow it. You know full well this witness is going to respond this way, and you should understand that.

MR. COOPER: I have one other line of questions, and I will be finished.

Q Mr. Frankel, we have introduced into evidence today the annual reports for 1970 through 1972. On April 26, 1972, you verified the complaint in this action, isn't that so?

MR. COOPER: Will counsel concede it was verified on April 26?

MR. POWERS: Yes.

Q In paragraph 11 of the complaint, it is alleged that the net asset value of Faggen Companies was as of the date of acquisition no more than approximately $1,200,000, and that

Titan has paid excess consideration of approximately $4,350,000 in valuable securities and in cash.

Did you believe that statement to be true when you signed and swore to the complaint, Mr. Frankel?

A The answer to that is I believed it to be true at that time, yes.

Q And you believe it to be true today?

A Since the complaint was signed, we have been able to do audit procedures of information which was not available to us at the time of the complaint and I think those numbers have been modified by the testimony that has been brought to this Court. I have no work sheets with me at this time which was the basis of the complaint, but at the time that complaint was signed, there were work sheets to establish those figures, and those work sheets were constantly being modified as audit data became available to us from the Faggen Companies which had not been available to us prior to the start of this litigation.

If you recall, part of this litigation was to get the records from the Joseph Warren Company, and we finally got them after litigation was started.

Q Could you please just answer my question?

A I am really trying.

MR. COOPER: I move to strike out everything not responsive to my question, your Honor.

THE COURT: Yes, I would agree with you here.

Q Mr. Frankel, my question is simply, do you believe that to be true today?

THE COURT: You mean the allegations in paragraph 11?

MR. COOPER: Yes, your Honor.

A I believe the gist of the allegations in paragraph 11 to be true today. I don't believe that the numbers conform to what the numbers are that have been testified to by our experts.

Q Did you examine the balance sheets which are contained in the reports before you, before the reports were disseminated to stockholders?

A I saw them. I am not an accountant. I have an independent accounting staff in the company, and I have an out-of-house certified public accounting staff who verified these figures for me.

Q I draw your attention to an item in the 1972 report, at the bottom of the assets headed, "Excess of Cost Over Net Assets of Businesses Acquired less Accelerated Amortization."

Do you see that?

A Yes.

Q Do you know what that item represents?

A That is a goodwill item.

Q I draw your attention to the third paragraph of

Note A to the Consolidated Financial Statements for the two years ended December 31, 1971.

A You are talking about the notes to the financials?

Q Yes. Note A.

A Yes.

Q Would you read that note out loud into the record, please?

A All of Note A?

Q Yes, the Note A dealing--

A You are talking about the notes to the consolidated financial statements for the two years ended December 31, 1971?

Q Right. The third paragraph is what I want.

A The third paragraph reads as follows:

"A portion of the excess of cost over net assets of businesses acquired in the amount of of $5,914,000 is carried as an asset and is not being amortized since it is believed to have continuing value."

Q Do you know what portion of the $5,914,000 carried as at December 31, 1971, represented the excess of cost over net assets of the Faggen Companies?

A In excess of $4,000,000.

Q Turning to the financial statement for 1972, do you notice that, again, the excess of cost over net assets of

businesses acquired less accelerated amortization, there is an item of $4,300,000 for the Faggen Companies?

A That is applicable to the Faggen Companies. I said in excess of $4,000,000, and I wasn't far wrong.

Q Now, these balance sheets and these reports were certified by Touche Ross, were they not?

A Yes.

Q Did you ever discuss with Touche Ross whether it was proper to include the $4,300,000 as an asset without any reserve based upon the claim that the asset should be written down?

A We had an extensive discussion about that prior to the 1972 report, and there was a very serious difference of opinion amongst the Touche Ross partners and our staff, and amongst the Touche Ross partners themselves, as to whether or not we should not start a program of writing down the amortization.

Q You heard Mr. Rohn testify here that in his judgment this company was not worth more than 7-times after-tax to 9-times after-tax earnings, didn't he, which meant that a value of something in the range of $1.4 million to $1.8 million?

A Well, if you take the goodwill out of the valuation that had been placed on the Faggen Companies, that's about what it works out to, doesn't it?

Q Mr. Frankel, so far as the shareholders were concerned, they were never advised that these companies were worth only 7-times or the $1.4 million or $1.9 million, were they?

A Well, if you recall, I wasn't there at the time of this transaction, I had no idea what the shareholders were notified of at that time.

Q I am talking about 1971 and 1972, not 1968.

A I think there was a full disclosure released to the press of the Faggen litigation and the basis of the Faggen litigation which I authorized, and I think it's been referred to in quarterly reports and in the annual reports, so that the stockholders have been very well aware of the fact that our basis for rescission of this merger is that we didn't feel that we had received true value at the time of the merger.

MR. COOPER: I move to strike as not responsive, your Honor.

THE COURT: Yes. However, again, would you please reframe your questions so that this witness listens to it once again and we know exactly what it is you seek.

Q Mr. Frankel, do you know what a representation letter is?

A That is a very broad question.

Q A representation letter to your auditors.

A Yes.

Q Did you sign in connection with these audits a representation letter to Touche Ross?

A Yes.

Q Did you state in substance in that representation letter to Touche Ross that you believed the assets certified to for the years 1971 and 1972 were accurate?

MR. POWERS: Objection, your Honor. This inquiry is becoming an accounting exercise. If they are overstated, the liability goes away, too, and this witness isn't qualified to testify about that kind of thing, too.

THE COURT: You are making quite a different animal out of this than I think is intended. Also, that particular basic reference in the annual report is fascinating. In fact, I have already made up my own mind about that. But Mr. Cooper apparently wants to ask some question about that, and if he will just phrase it so we understand him, I am going to allow it.

Now, let's go back. We are dealing with the 1971 and 1972 reports?

MR. COOPER: Yes.

THE COURT: What is it you want Mr. Frankel to answer?

Q My question was: Did you state in a representation

letter to Touche Ross that you believed that the assets certified for the years 1971 and 1972 were accurate?

THE COURT: Do you recall signing such a letter?

THE WITNESS: But there is specific language. I did sign a representation letter, but there is qualification language to the letter.

THE COURT: Do you have a copy of whatever it is you sent to your accountants in those two years?

THE WITNESS: Of course I have it.

THE COURT: I mean with you today?

THE WITNESS: No.

THE COURT: What you are trying to say is you don't recall the language with precision?

THE WITNESS: The document is about 40 pages long.

THE COURT: I just want to find something out. Do you mind?

THE WITNESS: You are correct. I don't recall.

THE COURT: You signed a letter and, of course, you can't be sure without seeing it what the language precisely was, isn't that what you are trying to say?

THE WITNESS: Correct.

THE COURT: Anything else?

MR. COOPER: Two questions and I am finished.

Q Do you know whether Touche Ross has notified the

Securities and Exchange Commission that the assets reflected in the balance sheets which it certified were overstated?

THE COURT: In fairness to Mr. Frankel, are you talking about 1971, 1972, both years?

MR. COOPER: '71 and '72, each year.

MR. POWERS: Objection. There has been no testimony they were overstated.

THE COURT: The implication is clear enough, Mr. Powers, and you may be right, but, nevertheless, this is cross examination.

A I think that I cannot answer what Touche Ross has done with respect to the S.E.C. I can answer that in our filings we adopted the same information that was in our annual report.

THE COURT: You are talking about the 10-K?

THE WITNESS: The 10-K filings, so the same information would be in those filings as in our annual report.

THE COURT: So far as you know, there has been no attempt to amend or modify, for example, 10-K's filed by the corporation?

THE WITNESS: The litigation has been reported. And the basis of the litigation has been reported.

THE COURT: But, so far as income, gross or net, there has been no modifications filed so far as you know?

THE WITNESS: I don't understand your question.

THE COURT: Assuming that as a result of your researches, Mr. Frankel, or that of your lawyer in this case, in the depositions and the documentations, and so on and so forth, do you know whether or not as a result of all that effort either the corporation has filed a modified or amended 10-K or perhaps has Touche Ross in any way sought to change the information pertaining to these annual reports by submission to the Securities and Exchange Commission?

THE WITNESS: You would have to tell me whether you are talking about the balance sheet or revenue information, because I think there is a distinction there.

THE COURT: I accept that, but I think we can ask it about both. Be that as it may, I don't want to quibble with you on this one, either. Let's confine it to balance sheet information.

THE WITNESS: The balance sheet information has been reported to the S.E.C. by modification indicating the litigation is pending challenging the valuation that was paid for the company or the net worth of the company as it is being carried on the balance sheet, and that has been reported.

THE COURT: And that is the only change or modification which, so far as you know, has been reported?

THE WITNESS: No. The income statements have been

adjusted as we have found information out pertaining to income, so that each year you have got adjustments to income.

THE COURT: On that I take it what you are talking about is the work which has been produced in this trial, or something like that, to show the latest account views as to what all this was income-wise?

THE WITNESS: That's correct.

THE COURT: That was done by Touche Ross or by the corporation or by both?

THE WITNESS: It was done by the corporation in conjunction with Touche Ross.

THE COURT: All right. Thank you.

MR. COOPER: I have no further questions.

REDIRECT EXAMINATION

BY MR. POWERS:

Q One question, if I may. What were the circumstances under which you sent the October 1971 interest payment?

A We were in negotiations through Mr. Sheib's office--

MR. COOPER: I will object on that, if your Honor please.

A --and that payment was made--

MR. COOPER: Just a moment. I am making an objection to a question.

THE COURT: Yes, I must say this allows an open-

ended argument. You are supposed to be a lawyer, though I know Mr. Frankel is trained as a lawyer. I would rather not give him an opportunity to argue the case now.

MR. POWERS: I will rephrase it.

Q Mr. Frankel, when you made the October 1971 interest payment to Mr. Faggen, did you reserve all rights against Mr. Faggen in connection with this lawsuit?

A It was made under reservation of rights letter which was in agreement with Mr. Sheib's understanding with me.

Q And is that letter 318-A?

MR. COOPER: I will object to that.

THE COURT: We will disregard that. We know about this, Mr. Powers. It is in the record already.

MR. POWERS: Thank you, your Honor. Nothing further.

THE COURT: You don't have to badger Mr. Frankel about that.

Thank you, Mr. Frankel.

(Witness excused.)

THE COURT: Now, does the plaintiff rest?

MR. POWERS: Yes, sir.

THE COURT: I suppose you would like to make a motion or two at this point, Mr. Burton Cooper.

MR. COOPER: Yes, I would, your Honor.

Is it appropriate?

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THE COURT: Yes.

MR. COOPER: Your Honor, I should like to move at this time to dismiss the complaint in which it is alleged that the defendant was guilty of a violation of Section 10(b)(5), and I should like to refer to the initial opening remarks which were made in this case, and that is that I think that every shred of evidence that has been introduced by the plaintiff on every aspect of this case, certainly as to those aspects which deal with those claims as pleaded, the plaintiff has failed to make out a prima facie case, and that this case was sham from beginning to end.

The complaint alleges that there was a misrepresentation with respect to a memorandum that was alleged to have been relied on by the board of directors of Titan, and the memorandum--

THE COURT: I wouldn't put it quite that way. I think what the plaintiff is really trying to say, at least now, is that Frank relied on it and so did Kaufman and that through them, in a sense, the corporation did because they never would have gone to the board at all if they really had not relied on these splendid memoranda, which we know as Plaintiff's 1 and 3, and so on.

Isn't that about what you now say?

MR. POWERS: Yes, sir.

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THE COURT: You may say this isn't very impressive, Mr. Cooper, and I understand you, but I just wanted to make sure I don't think they really claim now that the board in a direct sense relied on Plaintiff's 3, let's say somewhat simplistically at all. I think what they now come around to is to say that Mr. Faggen bamboozled those babes in the wood, Frank and Kaufman, and that through them the board became bamboozled because they were the ones who dealt with the board.

MR. COOPER: If we accept that as the thrust of their present claim, your Honor, so far as Mr. Kaufman is concerned, Mr. Kaufman never saw the document which is the document which is Exhibit 3. That document, he testified, was prepared after he had closed his transaction with Mr. Faggen, and so never saw it and couldn't have relied upon it.

So far as Mr. Frank was concerned, Mr. Frank's testimony was that he saw it and that he relied on it. However, he called upon Mr. McIntyre, since Peat, Marwick couldn't make an audit, he called upon Mr. McIntyre to look into it, and Mr. McIntyre has, by an exhibit introduced into evidence by the plaintiff here, Mr. McIntyre's affidavit, has set forth the fact that he did inquire, and that he did report to Mr. Frankel on the question of what constituted the adjustments that made up this document, and approximately two months

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elapsed between October 2 and December 3.

THE COURT: I tell you, I understand all this, and I think also one of your major arguments is that really even assuming that you can believe that these two gentlemen, or one of them, saw this memorandum of Faggen in his own hand, that there was no reliance in any event for a whole host of reasons.

MR. COOPER: Correct, your Honor.

THE COURT: I understand you perfectly on that, but I think the plaintiff has certainly perhaps made a prima facie case, assuming you believe certain witnesses as telling the truth, and at the moment I am prepared to assume that everybody who came in here has told the truth, a matter which I will not be ready to assume, however, once we have completed the entire case.

I am going to reserve decision on that motion, as the rules permit the judge to do, and ask the defendant to go forward with any additional evidence, if it cares to.

Then I will hear you and Mr. Powers at the end of the entire case on these matters that you raise now, and I quite understand in general, but I want to hear you again in detail at the end of the entire case.

I am going to insist that the motions be deemed to have been made and that this Court is reserving decision thereon

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with the direction to the defendant to add any evidence he cares to add at this time.

MR. COOPER: Thank you, your Honor.

THE COURT: Why don't we take a short recess at this point.

(Recess.)

MR. POWERS: Your Honor, may I respectfully ask leave to reopen to introduce in evidence the deposition of Richard K. McIntyre on the following grounds.

Mr. McIntyre has an affidavit in that binder that went to the 2nd Circuit. I called Mr. Cooper last week to ask him what his witness list was, and to respond to his request for some documents from me. He told me he had three witnesses today, including McIntyre. I assumed that I was going to be able to bring out some things I brought out in McIntyre's deposition in open court today when such witness was present.

I find that I cannot because they have elected not to bring him, and I feel prejudiced in having the record consist only of an affidavit drawn by my adversary for Mr. McIntyre, and I would like to have leave to put in his deposition so I can make reference to its contents.

THE COURT: Where is McIntyre now?

MR. COOPER: Atlanta.

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THE COURT: I thought he was still with Titan.

MR. POWERS: He hasn't been for years. They used him as a witness by affidavit in the old motion.

THE COURT: Do you have any objection to the deposition going in?

MR. COOPER: Yes, I do, your Honor.

THE COURT: What is your objection?

MR. COOPER: First of all, I believe that the question of the reopening of plaintiff's case for this introduction is improper.

Secondly--

THE COURT: There is nothing wrong with moving to reopen, and it's a non-jury trial and those things are generally done. I don't understand that.

MR. COOPER: What I am getting at, Judge, is that I had made a determination, and I had said to Mr. Powers when we had discussed the witness list that we might use one or more or none of the witnesses that are listed in our witness list.

THE COURT: He claims he spoke to you orally. This kind of thing, gentlemen, has gone on persistently and consistently. You never agree upon anything, including your own conversations. Let's get down to it. What is the real objection to the McIntyre deposition?

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MR. COOPER: The only objection I have is there are matters in there which I believe are either irrelevant or there are matters in there which are objectionable as to form, which were reserved--

THE COURT: That is right, but we can take those under consideration.

MR. COOPER: The point is that Mr. Powers did not give us as a witness list the witness Mr. McIntyre as one of the witnesses that he was going to call.

THE COURT: It is this kind of tangle that just puts tremendous burdens on the Court. We will have to have a separate inquiry as to who is telling the truth about what. It just seems to me unbelievable the lengths to which the parties and counsel have gone to in this case to make life difficult for themselves and for the Court.

I must say if you thought McIntyre was so important, Mr. Powers, you should have probably brought him. He is not within the control of anybody, apparently. If you could establish that--

MR. POWERS: He is in the control of Mr. Cooper. He made an affidavit for Mr. Cooper.

THE COURT: That doesn't mean he is in control. He doesn't work for Mr. Cooper or Mr. Faggen. He is down in Atlanta.

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MR. POWERS: They agreed he would be paid for his time, and he so stated in his deposition, and he has been paid--

THE COURT: They have a right to choose not to call him.

MR. POWERS: I know that. They told me they were calling him, and my problem is I have an affidavit that counsel prepared in the record of this Court, and the transcript contradicts that affidavit, and I could have contradicted it with the live witness, and I thought he was going to be here today, and I prepared to examine him, and now I find out he isn't coming.

I can cover the point by making reference to portions of the transcript. They are subject to objection as to form or relevancy when I make reference, but I feel I need it to complete my story.

THE COURT: I want to indulge you to reopen, I think that is a proper thing to do, but you fellows never do anything but drop these things at the worst time when the Court is under tremendous pressure which you have never been willing to help much about.

MR. POWERS: Can I suggest an alternative, your Honor? Would it serve the interest of justice if the McIntyre affidavit were deemed withdrawn from the record with no refer-

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ence to it or its exhibits?

THE COURT: The defense says they want that in there, and you agreed to it at the time.

MR. COOPER: I didn't offer it. Plaintiff offered it.

MR. POWERS: It was on the assumption a witness they male use of would be here at the trial. They brought him up for the deposition. I didn't subpoena him for the deposition. They brought him to New York under their control.

MR. COOPER: It's your deposition, not mine.

(Plaintiff's Exhibit 27 marked for identification.)

THE COURT: I will grant you leave to reopen, subject to you showing to Mr. Cooper, or his colleague, whatever it is you specifically want to offer so that he can then know exactly what you are talking about and make such specific objections as he cares to. But I am not going to stop now because, as usual, there are other problems which you have created--I mean you collectively--such as the fact we have got a witness Mr. Cooper wants to put on, so you do that, and I assure you, Mr. Powers, I am not turning you away.

MR. POWERS: I understand, your Honor.

THE COURT: As usual, you beset me with these problems at the worse possible time, and there has been no effort to accomodate anybody else's interest by either side here by

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this kind of thing.

MR. POWERS: My apology.

THE COURT: But I don't think your client should be cut off from offering such testimony of a witness as you may properly be allowed to put in. We know he is not here within the jury room, he is more than a hundred miles from the Court, etcetera. He is really not under the control of Harold Fagger any more than he is under the control of Titan, apparently.

I would think, therefore, that you can probably get the deposition in as long as there is no objection to relevancy or competency.

MR. POWERS: The copy I gave you is not signed. I will display a signed copy. I didn't put the signed copy in because it has notations by me in it, but let the record show Mr. McIntyre did sign the original of this.

THE COURT: I think the Court is entitled to receive the signed copy.

MR. POWERS: Then your Honor will be getting one with check marks.

THE COURT: Let's not do that, now. You have to show to Mr. Cooper what it is you wish to offer. He is entitled to that at least.

MR. POWERS: I will do that.

THE COURT: I will not say to you can't reopen as

long as it's in conformance with moderate fair treatment of the other side and in compliance with the rules of civil procedure.

Now, Mr. Cooper, can we have the witness that you are anxious to put on?

MR. COOPER: Yes, your Honor.

Mr. Shinagel, please.

F R E D S H I N A G E L, called as a witness by defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. COOPER:

Q Mr. Shinagel, what is your business or profession?

A I am president of Irving Rossi and Company. We are private investment bankers.

Q Mr. Shinagel, what is the particular background--what have you done in investment banking? What's been your experience?

A My association with Rossi dates for four years, and in that capacity we have been involved in venture capital, corporate reorganizations, technological developments, commercializing technological developments.

Before joining with Rossi, I spent ten years with Lazard Freres in the corporate finance field and in investment research.

Q Did you have any experience in mergers and acquisitions?

A Yes, I did.

Q Was that with Lazard Freres?

A Correct.

Q Did you have any experience in underwriting?

A I did.

Q As director of research for Lazard Freres, what did you do?

A I supervised ten analysts, and was responsible for the valuation of corporate securities and the selection of opportunities for investment, either in purchase or sale.

Q By the way, who are Lazard Freres?

A They are a prominent investment banking firm.

Q Located in New York?

A Yes.

Q And other places around the world?

A The New York firm has sister firms in Europe.

Q And as an investment analyst, what did your work consist of?

A The evaluation of corporations and their securities.

Q Prior to working for Lazard Freres, who did you work for?

A I worked for W. R. Grace and Company for six years in

the area of mergers and acquisitions. At that period, Grace was one of the most prominent corporations seeking to diversify by acquisitions.

Q What was your academic background before going to work with Grace?

A I am a graduate of the Sloan School of Industrial Management at M.I.T., with a Master's degree. Before that, I had a chemical engineering degree from Cooper Union.

Q Mr. Shinagel, pursuant to my request, did you look into and evaluate the securities transaction between Mr. Faggen and Titan?

A I only evaluated the security, not the transaction.

Q That's correct, the security which was issued to Mr. Faggen?

A Right.

Q In that connection, did you prepare a report?

A I did.

Q I show you this report and ask you if this is your report.

MR. POWERS: Objection on the grounds of relevancy. I think this is the damage issue being pushed into the liability trial.

THE COURT: You are certainly right in a sense, but I don't know if that goes far enough.

Let me ask Mr. Cooper. As you know, as we just discussed off the record, you agreed before we started with Mr. Powers that we would try the liability issue here first.

MR. COOPER: Yes, your Honor.

THE COURT: What's your theory of relevancy as to the liability issue only?

MR. COOPER: With respect to it, there is no damage in this case.

THE COURT: In other words, what you are trying to say is that--well, let me ask you, though, before I jump to any hasty conclusions, I take it that Mr. Shinagel was asked to evaluate these as of a certain time.

MR. COOPER: Yes, your Honor.

THE COURT: What time is that?

MR. COOPER: December of 1968.

THE COURT: All right. I will take it on that limited basis. Then maybe when we get to the damage issue, we will have relevancy at that time.

Q Mr. Shinagel, did you prepare that report?

A Yes, I did.

Q Does that report set forth all your conclusions reached in the analysis of the value of the securities issued to Mr. Faggen in December of 1968?

A Yes, the $5.5 million of face value, yes.

MR. COOPER: I offer that in evidence.

MR. POWERS: Objection. The witness is here, and if he is going to give opinion testimony on this limited basis, it ought to be given orally. I object to putting in evidence a report I haven't seen. I have not the foggiest idea what it contains at this point.

THE COURT: Just a moment. First of all, you will see it. Let's mark this as a defendant's exhibit for identification.

XXX (Defendant's Exhibit U marked for identification.)

THE COURT: Having seen this now, Mr. Powers, you still object?

MR. POWERS: Yes, sir.

THE COURT: I am going to overrule that objection then. As you suggest in part of your objection, we could have him do this orally, I suppose, but I don't see any reason for that. He is here, and he can be cross examined on his report.

I will receive the report for whatever it's worth.

XXX (Defendant's Exhibit U received in evidence.)

Q Mr. Shinagel--by the way, are you the member of any Society of Analysts?

A The New York Society of Security Analysts, and the American Finance Association.

Q How long have you been a member of the Society?

A It must be 15 years.

Q Without going through all of the details of your report, Mr. Shinagel, can you tell us roughly what you did in order to make an evaluation and what your conclusion was as to the value of these securities as of December 1968?

A Well, I had the description of the notes and the agreement of sale, I had the Titan annual reports for 1967 and 1968, and I assumed that the year-end 1968 annual report of Titan was as of December 2. It was a month time difference, but it was close.

I had Moody's and Standard and Poor reference manuals, and I had standard text books.

The problem that I saw was to develop the present value for the principal payments that were coming due six years from the December 1968 date. To develop the present value, one had to develop the appropriate interest rate of discount that would apply to these securities, consistent with the level of the market, other money rates, the financial strength and resources of the issuing company, the market environment in general, and so on.

I should also add that I went back to the Wall Street Journal for the period October through December 1968 to refamiliarize myself with the period, with money rates at that time, and with the environment.

I had concluded that the appropriate discount rate here to apply for purposes of the present value calculation was 11%, which is about a 3-1/2 percentage point premium over the equivalent prime rate after allowing for compensating balances, and also the rate that Baa bonds were sold publicly at that time. The rate at that time was about 7-1/2%.

The 3-1/2% premium brought us to an 11% interest rate factor, which I had deemed to be the appropriate one.

Now, the notes themselves already paid 4%, and this of course I deducted and applied a 7% interest rate for the present value calculation, and I came up with a value of approximately $3.2 million.

I made a note that the bonds were convertible, and reflected that in the 3-1/2% point premium, but also noted that the price of the stock had quadrupled since the beginning of the year, and was really at a very--was the benefit of much speculation in the market, and consequently regarded the conversion feature as an appropriate sweetener for the notes themselves.

MR. COOPER: Thank you, Mr. Shinagel.

CROSS EXAMINATION

BY MR. POWERS:

Q Mr. Shinagel, have you computed the present value of that 5.5 million in subordinated notes as of today by the same

standards you used for late 1968?

A As of today?

Q Yes.

A No.

Q In any event, would you agree that they would be worth a lot less today than they were in 1968?

A How do you get to that?

Q The stock in 1968 was $17 a share?

A It was 17-3/8.

Q And Mr. Faggen had a right to convert at 15 for 750,000 shares, is that right?

A Yes.

Q So he had a built-in profit on at least that portion of the notes the day he took the notes, didn't he?

A I don't know if you can distinguish between one portion of the notes and the other. The aggregate conversion price was $19 and change.

Q So the aggregate conversion price was about 10% over market, is that right?

A 11% over market.

Q Today, you know that Titan stock is about 75 cents a share, isn't it?

MR. COOPER: I will object to the question of what the valuations are today. That is not an issue in this case.

THE COURT: It isn't an issue, but I don't see how since he made his valuation as of December 1968 you can't go into it.

Q Would you agree the value of 5.5 million in 4% Titan notes with these conversion rights now is substantially below 3 million today?

MR. COOPER: I object.

THE COURT: I can take judicial notice of that, because as you point out and as I know the market value of the stock on the market today is very small, so you don't have to get into that with the witness.

MR. POWERS: Can you take judicial notice of the increase in interest rates so I won't have to ask the witness that, either?

THE COURT: Yes, I can, but I don't think you have to ask him since he has not done anything other than render his opinion about a valuation as of December 1968, and that is all.

Q Mr. Shinagel, you rendered your valuation just on what Titan gave in the transaction, isn't that right?

A That's correct.

Q If Titan didn't get in the transaction all that it bargained for, it would have given less than 5.5 million in these securities, wouldn't it?

MR. COOPER: I object to that.

A I--

THE COURT: Just a minute, Mr. Shinagel. That sounds awfully like an argument, not a question. I don't follow you. You rephrase that.

Q Mr. Shinagel, as you understood the transaction, Titan was willing to pay 5.5 million principal amount of these securities, which you say weren't worth par, is that right?

A Correct.

Q If Titan was unwilling to pay 5.5 million principal amount of these securities because it wasn't getting 5.5 million in return value, then Titan would have given less than 5.5 million principal amount, wouldn't it?

MR. COOPER: I object to that.

THE COURT: Sustained. I can see that without you putting it to Mr. Shinagel. That is an argument you can make, but don't make the argument with poor Mr. Shinagel, he didn't come here to argue.

A All I did was really value the bonds. I am not familiar with the transaction itself.

MR. POWERS: Thank you, your Honor. You have taken notice of the elements I wanted to bring out through this witness.

THE COURT: Thank you, Mr. Shinagel, you may be

excused.

(Witness excused.)

THE COURT: Now, Mr. Cooper, I don't see the parties to that other litigation which is going to be heard. If you would like, we could start with the other witness you have in mind, but I leave that up to you.

MR. COOPER: I don't mind starting.

Mr.

THE CLERK: Mr. Faggen, you are still under oath.

H A R O L D F A G G E N, the defendant called as a witness on his own behalf, testified as follows:

DIRECT EXAMINATION

BY MR. COOPER:

Q Mr. Faggen, sometime ago you testified in answer to Mr. Powers' questions regarding what transpired at the meeting of September 6, 1968. Do you recall that?

A Yes, sir.

Q Now, I want to take you from there forward. Did you meet Mr. Kaufman after September 6, 1968?

A I met him on October 2.

Q Where?

A At my office.

Q Who was present?

A Mr. Kaufman, Mr. Frank and myself.

Q Was that a Jewish Holy Day that day?

A That was Yom Kippur.

Q Were there any people in your office on that day?

A There was a skeleton crew because we have Jews and non-Jews on the staff.

Q When Mr. Kaufman met you on October 2, will you tell the Court what transpired on that day?

A Yes, sir. When Mr. Kaufman met me that morning, it was about 9 o'clock in the morning. That was his first time in the office. Mr. Frank had, of course, been there a number of times. I gave him a few minute tour of the office and then we went to my office where I had prepared, as he had requested, copies of the tax returns for the various companies for five years.

I had also the accounts receivable ledger and I had the employees employment sheets which he had asked that I have.

Now, bear in mind this was October 2. One of the Faggen Corporations had a September 30 fiscal year. For that corporation, I had a work sheet prepared by the accountant for the nine months ended June 30, and we had somehow figured out what the earnings would be for the full year, and I had that work sheet and the other tax returns.

Mr. Kaufman started by saying he had heard that on an adjusted basis I had stated that I thought the earnings of

the Faggen Companies for the fiscal years ending in 1968 would be approximately $500,000, and he asked me to go through the returns and find out for him just which adjustments I had in mind in arriving at the approximately $500,000.

Starting with the principal return of Harold Faggen Associates, Incorporated, I pointed out we had profit before Federal income tax of $288,000, and for Actuarial Tabulating Corporation $40,000, for Employee Fund Services Corporation $26,600, and for Fund S&E Corporation $10,400.

Those were the figures on the tax returns.

I told him that I contemplated the following adjustments. Since the companies had been publicly-held and they had wanted to maximize profit, which was my understanding, there would have been no contribution for pensions. And for the Harold Faggen Associates' return, that would have added $158,000 to the figures, and for the Actuarial Tabulating Corporation $6,348.

We then went through and added back the city and state income taxes on three of the returns. The fourth corporation was new, it had never paid any taxes, the Fund S&E Corporation, so there was no adjustment there. But on the tax adjustments for Harold Faggen Associates, it was $5,274 for state tax and $9,546 for city.

$1,368, and the city tax, $2,445.

For Employee Fund Services Corporation, the total was $1,543 for state and city on the work sheet which the accountant had given me.

We then turned to other things that I had told him would not have been paid if the company had been publicly-held. One thing was apartment rent.

THE COURT: Apartment rent?

THE WITNESS: Yes, sir. The corporation paid part of my apartment rent. I do work there, and it paid in that year $2,450, which we all agreed would not have been paid if it had been publicly-held.

There was a legal fee paid out of the corporation that year of $3,500, which was unrelated to the business operation and agreed that such a fee would not have been paid if it had been a publicly-held corporation.

Then there was the matter of other expenses that would not have been paid, and we discussed the fact that on this return there was an item of travel expense of over $10,000, there was entertainment expense of over $13,000, substantial sums for gifts and Christmas expenses, staff luncheons, convention expenses, stationery, printing and postage, in very large amounts, and it was agreed that these items

where the vouchers were checked, and we arrived at a figure that I suggested of $24,000.

I might add, sir, that there was the expense of a boat that was occasionally used for business purposes, but agreed that that would not have been an expense of a company that had been publicly-held.

At that point, both Frank and Kaufman said, well, you have already passed the $500,000 figure, and I think you will find that that is over $500,000, taking into account, sir, the $35,280 which we agreed would have been in the corporate income. That $38,280 of professional fees which never entered the corporate income, and we had discussed that, they were paid to me directly, and I kept them. So, together, you are well over $500,000.

Now, they seemed pleased, but at that point, Mr. Kaufman said, "That's fine as far as it goes. But, now, let me tell you about some additional items that we in Titan would not have paid in that year."

He said, "In the first place, Mr. Frank, who was the president of the whole corporation, had been employed at a salary of $50,000 a year," and it was the position of the control group Mr. Kaufman represented that they did not intend to pay more than that to the head of a subsidiary that they

I told him quite frankly I couldn't consider that, if that was to be their salary rate for the past and extending into the future, I couldn't consider it because I needed more than that for my obligations.

At that point, Mr. Kaufman said, "Just hold that in abeyance. The deal that I have to offer you will, we believe, give you the money you need so that you can take care of whatever needs you may have."

On that basis, he added $25,700, because I had received a salary of $75,700 from Harold Faggen Associates, and he added $12,000 because I had received that much from Actuarial Tabulating Corporation.

Then he said he noted that Rose Dogan's salary on Harold Faggen Associates was $45,900, and on the return of Actuarial Tabulating Corporation she was listed as $3,600, and he didn't know whether she had anything in Employee Fund Services, and I assured him she did, and he said, of course, she would have to be scaled down from my salary. He said they wanted a salary of $40,000 a year for her.

Again, I explained I did not know whether I could get her to agree to that, we had never discussed anything like a salary cut, and Kaufman's position was wait until you hear what we have to offer, and I think you will be able to make

Then he turned to automobiles. He said it was the feeling of the Group that they did not want automobiles used, corporate cars used, except where they are necessary to the work that people were doing. They didn't want them used as additional emolument.

He could see we had on the return an item of $2,967 for depreciation of automobile equipment and automobile expenses of $4,657 in addition to that, plus, of course, insurance items which were in other accounts which we had not broken out, and, again, I objected, I told him that I had two cars assigned to me, certainly I would be willing to give up one, but I would have the exepsne of another, Rose Dogan would have the expense of a car, and I believe there was still another employee with a car, and, again, he said that, "Let's hold that." The offer he had, he kept holding that out, would take care of anything that I might need along those lines.

We finished that way with years ending in 1968, and we took up 1967, 1966 and 1965 in somewhat similar fashion, but not in as great detail.

And then Kaufman said that, "We are satisfied with the figures, they certainly come up to what we had expected, to what Mr. Frank had told them I had said that on an adjusted basis it would be approximately half a million dollars," it was well over that according to his calculations, and he made

his offer.

He said that they would be willing to pay $5.5 million in convertible notes, installment notes, so the tax would be deferred, bearing 4% interest.

I told him then I had several objections, that I had been talking to others about higher amounts, and he had a ready answer for that, that I had been talking stock, which would not give me income, this would give me an income of $220,000, which is what he was referring to when he said I would have the ability to take care of whatever costs were involved.

I complained about the 4%, and he said, "Frankly, if I could pay less I would offer less, but there is a minimum below which we can't go without subjecting you to tax problems."

I was unfamiliar with them, but he assured me that any attorney who represented me in this would be familiar with the fact that if they did not pay 4% the government would impute a higher rate.

We discussed maturity, and he wanted 9 and 10 years, and I told him I did not object to completing payment in ten years, but that I wanted it to start considerably sooner than that, and he quickly modified that to 6 to 10.

We talked about convertibility rate, and he was suggesting $20. I told him that I felt I would like more of an

equity incentive, and not in terms of options on. He said there was some reason, S.E.C. regulation, that they couldn't give me options, but they would not be adverse to having convertibility of a part at a lower rate, and he suggested $75,000 of notes at $15.00.

I had continuing objections to that, thought it should be higher, and he said, well, that will not be one of the issues on which there will be a falling out, if we can agree on everything else.

I told him I had had no experience with this, what is involved, and he said, "Well, there will be two or three months of legal negotiations and wrangling before the lawyers complete all their clauses, all of the contracts," and I asked him then as of what date would the notes start, and he said, "As of the closing."

I asked him, "As of what time would the profits start going to Titan," and he said, "As of the date of our discussion," which seemed to me very unfair, and he agreed and agreed that whenever the closing took place, the interest would start from that date of October 2.

We discussed a number of other things. One thing I pointed out, that I had a collection of sculpture that was held by Faggen Enterprises, Incorporated, which was a wholly-owned subsidiary of Actuarial Tabulating Corporation, and tha

I certainly did not want to give that up.

Frank then interjected, no, of course not, we are not buying sculpture, and Kaufman said, that's right, a way will be found to spin that off in the final closing so that I would continue to own that company and therefore own the sculpture.

We then looked through my client ledgers and discussed some of those matters. They looked through the employees' records. We spent several hours going over a number of details. And when they were completely satisfied, Mr. Kaufman said that as far as he was concerned, speaking for the Block group, the control group, we have a deal.

I asked him what that meant, I should stop talking to others, and he said as far as they are concerned unless I can foresee some issue that would break down on we have a deal.

We shook hands all around, and they prepared to leave. Before leaving, Mr. Kaufman asked me can I draw--since I did not have these figures then--can I draw some table showing the bottom line figures as adjusted for four of the years. He was not interested in the fifth going back.

I told him I didn't know just what he had in mind, I could put down some figures, and he said, that's all right, that's all that's necessary, he was going to return to California but Mr. Frank would be in New York, I could put down something, meet with Frank, and make whatever changes he might

want in it.

He asked that I draw up something in a table on the clients and the length of time they had been there, and a similar thing on the employees.

Then he asked if I would write a page or two of text with the companies, and, again, I told him I did not know what he wanted, I would be glad to work with him in writing up something, but I had never done anything quite like that, and, again, he said, "Tony has some ideas, and he will be here. Show him what I do, talk to him about it, and whatever has to be done, he will take care of it."

And with that, they left.

THE COURT: Mr. Cooper, the litigants in the other case are now here. We will break at this point and resume at 10 o'clock tomorrow morning.

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TITAN GROUP, INC.

v.

72 Civil 1797

HAROLD FAGGEN

March 14, 1974

THE COURT: Mr. Burton Cooper.

MR. COOPER: Yes, your Honor.

THE COURT: Are you ready to proceed?

MR. COOPER: Yes, your Honor.

H A R O L D F A G G E N, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. COOPER:

Q Mr. Faggen, I believe when we concluded last night I had elicited testimony from you as to what had transpired at the meeting of October 2, is that correct?

A Yes, sir.

Q You have also testified that you were requested to prepare a summary for Mr. Frank?

A Yes.

Q That summary has been introduced in evidence, and you have had occasion to read both your handwritten summary and the typed-up version of it, have you not?

A Yes, I have.

Q Tell the Court, Mr. Faggen, is there anything in that

summary which was not true at the time that you made it?

A Nothing, sir. Nothing in there which was not true.

Q Dealing now specifically--

THE COURT: You are talking in respect to Plaintiff's 3?

MR. COOPER: Yes, your Honor. That is attached to the complaint.

THE WITNESS: My handwritten version of it, sir.

Q The typed version has some typos and other corrections in it, correct?

MR. POWERS: I have to object to the leading.

THE COURT: I will agree you don't need to lead Mr. Faggen.

Q Mr. Faggen, at least so far as you are concerned, the handwritten one was in every respect true, right?

A Yes, sir.

Q Did you have any discussion with Mr. Frank at any time with respect to whether or not investment income was included in the restatement of earnings which was attached to that memorandum?

A Never, sir, no discussion of any kind.

Q You have heard testimony with respect to data processing capability of your company at the time you met with Mr. Kaufman and Mr. Frank, have you not?

A Yes, I have.

Q Did you have any discussions with Mr. Frank regarding the data processing of your company?

A Mr. Frank had visited us on a number of occasions--

MR. POWERS: That calls for a yes or no, your Honor.

THE COURT: I would agree.

Q Just yes or no.

A Yes.

Q What did you discuss?

A Mr. Frank had visited the premises on a number of occasions, we had discussed the equipment, what we were doing. He was quite knowledgeable with respect to data processing. I would say his knowledge was greater than mine on a personal level.

MR. POWERS: Objection, and move to strike.

THE COURT: Yes. That is not the question, Mr. Faggen.

As I understand it, Mr. Cooper, you are asking him when these conversations took place.

MR. COOPER: Yes, your Honor.

Q When did the conversations take place, Mr. Faggen?

A We had a number of conversations from the time I first met Mr. Frank, which was in the summer of 1968, and they continued thereafter as long as he was connected with the

to dig them out now.

However, while I am doing that, I would like to ask you, Mr. Faggen, I didn't understand an answer that you gave to a question of Mr. Cooper.

Did I understand you to say that there was no discussion as to whether or not the figures which were part of your so-called Plaintiff's 3--that is, your handwritten version of the memo you prepared at Mr. Frank's request--did I understand you to say there was no discussion as to whether or not any of the earnings figures included investment earnings?

THE WITNESS: There was no discussion, sir. We took them from the tax returns, including everything that was on there.

THE COURT: In other words, you clearly understood at the time, first of all, that those earnings, particularly those taken from the tax returns, necessarily included investment income.

THE WITNESS: Yes, sir.

THE COURT: So that the thrust of your answer, I gather, was that there was no discussion to that effect in any of your conversations with Mr. Frank and Mr. Kaufman.

THE WITNESS: That is correct. There was never any separate discussion about investment income.

THE COURT: All right.

organization.

THE COURT: May I interject here and see if I can get this straight. You started talking to Frank in the summer, and apparently you continued up to, let's say, at least October 2. Let's use this as a terminal point for the moment. Is that correct?

THE WITNESS: Yes.

THE COURT: Are you telling us these conversations in the main took place at the offices of the Faggen Companies here in Manhattan?

THE WITNESS: At the offices of the Faggen Companies and Titan offices, but I said that he visited the offices and seen the equipment and had observed that capability.

THE COURT: On how many occasions in these visits and conversations did you discuss, one way or another, data processing?

THE WITNESS: As distinguished from everything else, sir, I would not be able to say, because it always came up whenever we met and discussed the operation.

THE COURT: All right. Go ahead, Mr. Cooper.

MR. COOPER: I have no further questions.

MR. POWERS: Your Honor, can I borrow the first 8 or 9 exhibits for my examination, please?

THE COURT: I was anticipating that, and I was tryi..g

CROSS EXAMINATION

BY MR. POWERS:

Q Mr. Faggen, did you tell Kaufman or Frank that you were adding investment income back into the figures to reach $571,000 in Exhibit 3?

MR. COOPER: May we identify what Exhibit 3 is?

MR. POWERS: The so-called sales memorandum annexed to the complaint.

Q Do you understand my question, Mr. Faggen?

A I am waiting to see.

Q My question to you, sir, is: Did you tell either Tony Frank or anyone else in Titan that you were adding investment income back in to reach $571,000 for 1968?

MR. COOPER: I object to the form of the question, your Honor.

THE COURT: I must say I am confused. I just asked him whether there was any discussion with Frank or Kaufman about investment income at all.

MR. POWERS: Right. I am going one step beyond that to say, did you--

THE COURT: I know, but no one said there was any adding on, so to speak, and therefore, I think you ought to rephrase it.

case?

A Yes, I did.

Q Was Tony Frank telling the truth when he said that he wrote on here in his own handwriting, "Excludes investment income," on Exhibit A to Exhibit 3?

MR. COOPER: I will object to that.

THE COURT: In a sense, he is right, Mr. Powers. However, you don't need be concerned. I suppose it is technically true that Mr. Faggen is not here to determine the credibility of other witnesses.

Q Did you hear Tony Frank testify that he wrote that in on the document?

A Yes, I heard him so testify.

Q Did you hear him testify that he wrote it in after discussing the matter with you and asking whether this excluded investment income? Did you hear him testify to that?

A Think I heard him.

Q Is it your testimony Tony Frank wasn't telling the truth when he said that?

A Absolutely.

Q Was Ben Robinson telling the truth when he said he wrote in, "Excluding investment income," on the third page of Exhibit 3-B?

your Honor.

THE COURT: Yes. Let's not repeat that, Mr. Powers.

Q Mr. Faggen, is it your testimony that Ben Robinson wrote in the phrase in his own handwriting, "without investment income," without any discussion with you on that subject?

A Mr. Robinson testified, if I heard him correctly, that he wrote that as a question to himself by which he intended to inquire but never did.

Q Mr. Faggen, we will let the record speak for itself on that. But you remember Ben Robinson saying he wrote this on the document, don't you?

A As a question to himself, yes.

Q Did you read Mr. McIntyre's deposition before you came to court?

A Not recently, but I have read it.

Q Do you recall Mr. McIntyre testifying that this Exhibit 3-B, which was called Exhibit M-1 in his deposition, appeared to be a document with handwriting by him in his files at Titan?

MR. COOPER: Where is that?

MR. POWERS: Exhibit--

MR. COOPER: No, where did Mr. McIntyre testify to that?

"Q Now, I show you, sir, the first page of M-1. Is that in your handwriting?

"A Yes."

MR. COOPER: May we have M-1?

MR. POWERS: This is M-1. It is marked 3-B in this trial.

MR. COOPER: If I understand what you are asking--if your Honor please, before I make my objection, may I have the question read back?

THE COURT: Yes.

(Record read.)

MR. COOPER: Your Honor, I am going to object to this question unless--and I would like your Honor to see the answers given by the witness and the exhibit, because I think the question is improper.

Your Honor will notice there are three pages to this document. The question was addressed to the witness whether this was in Mr. McIntyre's handwriting. The question in the deposition deals with the first page being in his handwriting. The questions which followed deal with the other pages and there are different answers.

MR. POWERS: The whole deposition is in evidence, and I plan to--

THE COURT: Look, gentlemen, once again you can only blame yourselves for this problem. Let's start all over again, Mr. Powers. You have certainly confused me, and, therefore, I have to assume you have confused the witness, and, therefore, from that you must draw the inference that you are not helping your cause at all. Let's do it in a proper fashion.

Start all over again.

Q Now, Mr. Faggen, you read McIntyre's deposition, didn't you?

A Yes, I have read it.

Q I show you a document which we have marked 3-B in this trial, and it was marked M-1 in McIntyre's deposition. I ask you if you recall McIntyre's testimony that those are notations in his handwriting on the first page of Exhibit 3-B?

A I can't say that I have a distinct recollection of whether he said--just what part of it he said. I recall he did say something about part of it, at least, being in his handwriting.

Q Did he testify, if you recall--

A I don't recall.

Q --that the second page was in his handwriting?

MR. COOPER: I object to what he testified to.

THE COURT: Yes, what's the point of this. He either testified or he didn't testify, and this isn't a memory exercise

about other witnesses' testimony.

Q Is it your testimony, Mr. Faggen, that somebody in Titan wrote, "without investment income," on the third page of that Exhibit without your authorization?

MR. COOPER: I will object to that, your Honor.

THE COURT: I am sorry, but I am going to have to ask you to repeat it. Both of you were talking at once.

Put that again, would you please, Mr. Powers?

Q Mr. Faggen, is it your testimony that somebody in Titan wrote the phrase, "without investment income," on the third page of this three-page exhibit containing McIntyre's handwriting, without any discussion with you?

MR. COOPER: Your Honor, that is a totally improper question. I don't know whether to burden the record with my objection. I think I will simply make it.

THE COURT: You will recall, Mr. Powers, that I had asked whether or not he had had any discussions about investment income with Kaufman and Frank.

MR. POWERS: Right.

THE COURT: Your claim, among other things, has implicit in it that there were many people in those days working for Titan.

MR. POWERS: Yes, sir.

THE COURT: So that is the first fallacy. I can't

understand why you, as a lawyer, persist in muddying your own waters. Let's do it in a reasonable way so that everybody can understand you. You are entitled at least to some reasonable clarity. Don't you see the dichotomy there?

Q Mr. Faggen, is it your testimony that you didn't discuss the investment income point with McIntyre, either?

A Any investment income discussion with McIntyre, I did not.

Q Is it your testimony, notwithstanding Mr. Robinson's handwriting on this document, that you didn't have any discussion with Mr. Robinson on that point, either?

MR. COOPER: He already answered that question.

THE COURT: You may be right, but at the same time I am going to take it again. There has been so much confusion that I wouldn't know. Go ahead.

Q Do you understand the question, Mr. Faggen?

A Would you repeat it.

Q And is it your testimony, notwithstanding Mr. Robinson's handwriting on the document, that you didn't discuss the exclusion of investment income with Mr. Robinson, either?

A That is my testimony, as it was his.

Q Mr. Faggen, is it also your testimony that on Exhibit 8 you made no distinction between operating income of $570,000 and investment income? Is that your testimony, too, Mr. Faggen?

MR. COOPER: I will object to the form of the question. The document speaks for itself.

THE COURT: I can't even understand you two, because you talk as though there is nobody in this world except either of you. I am sorry, I am going to have to have this read back. If you think this is the way to conduct a trial, I am sad to say I disagree. I can't even hear you.

I don't know whether you got it, Mr. Reporter, but I am going to have to have your help, if you can do it.

(Record read.)

THE COURT: I don't agree with either one of you, which is a frequent phenomenon, I have to admit. First of all, are we referring to 3-A?

MR. POWERS: No, Exhibit 8, your Honor.

THE COURT: Second of all, then, I would say that the question is just totally a reductio ad absurdum. He hasn't mentioned 8 at all. Second of all, it isn't a proper question because it's susceptible to at least two, if not more, interpretations.

MR. POWERS: Question withdrawn. I will rephrase it.

Q Mr. Faggen, who asked you to prepare Exhibit 8?

A Nobody.

Q You prepared it yourself, right?

A That is correct.

Q And you supplied it to Ben Robinson?

A I went to Ben Robinson to discuss what I considered to be a problem after the closing.

Q I didn't ask you that, and I move to strike that last part.

Mr. Faggen, on Exhibit 8 you made a distinction between $570,000 in operating income and investment income, didn't you, for 1969?

A For 1969 on Exhibit 8.

Q You made that distinction, didn't you?

A Yes, I made many assumptions on Exhibit 8 and distinctions.

Q Back in 1968, when you wrote Exhibit 3, did $571,000 in adjusted income for 1968 for the Faggen Companies seem like an artificially high figure to you?

A Not adjusted as Mr. Kaufman insisted. Not with the adjustments that he insisted be included.

Q Mr. Faggen, when you put down $571,000 on the Diebold memorandum, it seemed ridiculous to you, didn't it?

A The Diebold memorandum contained many other factors. The Diebold memorandum and the figure of $571,000 resulting from my discussion with Mr. Kaufman and Mr. Frank on October 2 were just not comparable at all. They were not comparable in any way.

Q Let me ask you if you recall being asked the following questions and giving the following answers on your deposition on the subject of the Diebold figures. Page 171:

"Q It is that $600- to $700,000 in earnings for 1969 that he wrote down, that he asked you to write down that shut off the discussions effectively?

"A As far as I was concerned, yes.

"Q You thought those figures were ridiculous?

"A Well, remember that he wrote three years out and he was quoting telephone numbers after that.

"Q That is right.

"A I never even wrote them down.

"Q So, for the first year '69, it was quoted wild enough to suit you, you didn't write down any numbers after that, is that correct?

"A I don't know what you mean by wild enough to suit me.

"Q Once he gave you the figure for '69 of six to seven hundred thousand dollars in pre-tax income from your businesses, you felt that that figure was so exaggerated that it was pointless to write down any figures that he gave you for subsequent years?

"A That is my recollection."

Now, Mr. Faggen, if you added your investment income

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to the $571,000 that is in Exhibit 3, your adjusted earnings would be over $600,000, wouldn't they, based on your adjustments?

A That is not what was doing.

Q Do you recall being asked this question on page 182:

"Q Did you tell him that the $571,000 figure for 1968 was equally exaggerated?

"A I wasn't presuming to tell him anything about the $571,000. Those were his figures.

"Q Did you consider it exaggerated?

"A I can't say that I gave it much thought. I had never been involved in this whole science of public issue. He was supposed to be part of an expert team on it. Who am I to tell him how to handle it?"

Do you remember giving those answers to those questions, Mr. Faggen?

A Yes.

Q But when you gave the same figures, $571,000, to Titan, apparently you didn't feel they were so ridiculous, did you?

A They weren't the same figures.

MR. COOPER: I am objecting to this as being argumentative, your Honor.

THE COURT: I again can't understand whether this is

a question, or what it is, but it may not be Mr. Powers' fault because I get a melding of voices here. If you feel that you press this, Mr. Cooper, I will have to listen to the question.

MR. COOPER: Your Honor, I don't want to burden the Court.

THE COURT: No, no, it is not a burden, but I just don't understand what the point is, and I will have to listen to it.

MR. POWERS: Would you read back the question, sir?

(Record read.)

THE COURT: I am inclined to agree that it is a little argumentative, but I am going to let it stand.

Q Now, Mr. Faggen, did you tell Tony Frank or Robinson, or anyone else in Titan, that you used different assumptions to get the $571,000 for them as compared to the $571,000 you gave to Diebold?

A When the $571,000--and there was no mention of a $571,000 during our meeting, because we had not added up all the figures on October 2--but when that figure resulted from our discussion, I went over with them item by item what went into it.

Q Did you tell Kaufman at the October 2 meeting about the $59,000 charge against income for accrued vacation pay?

A I told you that I went over the items with him from

the tax returns. I told him no more and no less.

Q So you didn't tell him that there was a $59,000 reduction of income resulting from the accrual of vacation plan benefits, did you?

MR. COOPER: I object to that, your Honor.

THE COURT: This has already been covered, so perhaps that is your objection.

MR. COOPER: Your Honor, it is assuming of state of facts which isn't in evidence.

THE COURT: I must say, Mr. Powers, the way you put it, it sounds like when did you stop beating your wife somewhat. On the other hand, I must also say, notwithstanding Burton Cooper, Esquire's remarks, that this has been covered on many occasions, including your direct examination of Mr. Faggen, I believe, when he first appeared as our first witness.

However, if you feel this is important, I wish you would rephrase it.

Q Mr. Faggen, you didn't tell Kaufman that there was a $57,000 charge against income for accrued vacation pay, did you?

A In the first place--

Q I think you can answer that yes or no.

THE COURT: No, no, let's not argue with him. Let

him answer, Mr. Powers.

A In the first place, we were discussing cash statements. Mr. Kaufman is a C.P.A., he knew what we were discussing, I didn't have to tell him anything about that. On a cash statement, there wouldn't be an accrual.

In the second place, if there had been an accrual, only a very small part of that would have been applicable to any one year.

Q But over the four years, most of it would have been applicable, wouldn't it?

A No.

Q Mr. Faggen, that $59,000 item was important enough so that you were asked to guarantee $36,000 of it at the closing, weren't you, in terms of a balance sheet?

A Yes.

Q And you picked it up not only for yourself but for Rose Dogan, too, didn't you?

A That is correct.

Q But, since the closing, vacation pay has still been accruing according to you, hasn't it?

A Why, of course.

Q And you are making a claim against Titan for accrued vacation pay right now, aren't you, since 1968?

A Of course.

Q And how much in vacation pay are you claiming against Titan now?

A I don't recall the figures.

Q But it is one of the elements in a state court suit you have brought against Titan, along with Rose Dogan, isn't it?

A Along with salary for my last month of employment which they haven't paid.

Q You are asking for, I think, $46,000 in that case, aren't you?

A I don't have the figures.

Q And Rose Dogan is asking $52,000, isn't she?

A I don't have the figures.

Q Do you recall testifying that at the close of your meeting on October 2, Tony Frank and Kaufman told you to write up a description of the business, is that correct?

A That's correct.

Q That meeting at October 2 was the handshaking, so to speak, when the deal was made, is that your testimony?

A That's correct.

Q So you wrote up this memo as kind of a post-negotiation step, is that right?

A That's correct.

page 45 of the appendix, that it was a preliminary step when you gave Titan Exhibit 3? Let me read it to you.

"Early in October 1968 at a preliminary stage in our discussions, I provided a summary description of the business, Exhibit A hereat."

It wasn't a preliminary stage, was it?

A You would have to break down the stages here. I later learned that it was a preliminary stage, because there were discussions of negotiations right up to that closing on December 2, when we had to negotiate the one item you have just mentioned.

Q So you are telling the Court now that your affidavit, the first affidavit you filed in this case, wasn't true on that point?

MR. COOPER: I object to that as precisely the opposite is what he testified.

THE COURT: You may be right. The next question.

Q As I understood your testimony, you told Kaufman that you had very little in being in terms of computer packages and skills, is that your testimony?

A I don't know what you mean by I told him we had very little in being.

Q Let me read you what you say you told him, according

Court that you told him all those things.

Question, page 340, referring to the computer operations:

"Q You told him it was only in the formative stage, didn't you?

"A Oh, yes.

"Q And you told him it was only beginning and wasn't really an established system yet, didn't you?

"A Of course.

"Q And you told him that you had a program set up for pension plans already?

"A I told him we were developing--

"Q You made it clear that you didn't have any in existence yet?

"A Absolutely.

"Q And you told him that you were going to make it available to a lot of new customers, didn't you?

"A I told him I thought that if we were successful in developing it, that it was the kind of program that could be useful to certain types of new customers.

"Q Well, you told him it would be useful, didn't you?

"A I told him we never tested the market and,

"Q Well, you told him that it could be done at reasonable prices, didn't you?

"A I told him that if we were successful in developing the program that I had in mind and that I described to him, that I felt it would bring down the cost of actuarial changes for small groups of people within range as to make it very attractive.'

"Q But you made it clear to him that you had not fully developed the program yet?

"A Nobody had developed a program.

"Q You didn't have anything to sell at that time, did you?

"A I won't answer that question. That is a very derogatory question.

"Q No. In terms of the pension plan, that is what I am talking about. That is all I am asking.

"A You asked me whether I had a fully operational computer, automatic computer program.

"Q In being at the time.

"A For small clients?

"Q Yes.

"A The answer to that would be no, but we were collating pensions by computer and had been doing it

Now, the next question, page 343:

"Q You have made yourself clear. Well, you made some sales efforts by then, hadn't you?"

MR. COOPER: That is not the answer. "You have made yourself clear" is the question.

"A But not completely automatically.

"Q You have made yourself clear. Well, you made some sales efforts by then, hadn't you?

"A No, not on that. Didn't have it to sell."

Are those still your answers to those questions? You claim you told all that to Kaufman?

A Absolutely.

Q Mr. Faggen, why did you write up the way you did in Exhibit 3 for submission to Titan's board? Why did you say in Exhibit 3, "Since we are in constant touch with many trade unions, we have undertaken the task of programming a completely automated union office."

Was that true?

A Certainly.

Q And, Mr. Faggen, did you have a very substantial client under contract at that time?

A Absolutely.

Q Mr. Faggen, is it your testimony that you had been speaking to brokers and accountants and lawyers and you had

been making a selling effort to them, as described in your Exhibit 3?

A Not at all. My testimony is--

MR. COOPER: Your Honor--

THE COURT: Just a minute, gentlemen. Now three of you are talking at once.

THE WITNESS: Sorry, sir.

THE COURT: What is your point, Mr. Cooper?

MR. COOPER: The point is if counsel purports to be reading from it and asking him whether he said it, he ought to read it.

THE COURT: I agree. Also, Mr. Powers, though I will assume you are trying to expedite matters, for which I should give you credit, I think that you are going a little too fast. It all sounds to me like a jumble of words. So, let's go back.

Q Mr.Faggen, my question to you is: If you told Kaufman and Frank all these things about how little you had in the computer field, why did you write up the following things in Exhibit 3 for submission to Titan's board--and I will read it to you:

"Since we are in constant touch with many trade unions, we have undertaken the task of programming a completely automated union office."

Now, Mr. Faggen, would it have been more accurate to say you had no program in being and you were considering programming a completely automated union office?

MR. COOPER: I must object to that question.

THE COURT: No, I will allow that.

A Not at all. We had undertaken to program an automated union operation.

Q As a matter of fact, you had not even started in 1968, isn't that right?

A I said we had undertaken to program.

Q Was it anything more than an idea in your head in 1968?

A Yes.

Q Mr. Faggen, you have a statement here in Exhibit 3, "A very substantial client has already been obtained, and we expect the fees from this client to be sufficient to pay all development costs." Would it have been more accurate to say you didn't even know what the development costs are when you wrote that sentence?

A The statement was correct. We had estimated that the fees would be sufficient to cover the development costs.

Q Did you have any written estimate of what the development cost was?

A No.

Q Then how could you measure it by the fees you thought you would get?

A We had discussions with the staff and thought that what we were quoting, and which the client had agreed to pay, would be sufficient to program it.

THE COURT: Who was the client?

THE WITNESS: The client was the Amalgamated Lithographers of America, Local One, sir.

Q Did you have any memos on what you were going to charge that client?

A Yes.

Q Do you have those memos with you?

A No, they are in the Titan files.

Q Did you have a contract with the client?

A We had a verbal contract, it's all we ever had with this client for many, many years.

Q Did you tell the client what the development costs were going to be that he was going to cover for you?

A We told the client what we were going to charge him.

Q But you didn't know what the development costs were going to be because you didn't develop it?

A I said we had estimated the development costs.

Q Mr. Faggen, there is a sentence in Exhibit 3: "Since we have both actuarial and computer capacity, we are in the

process of programing completely automated pension plan for small and medium size employers."

Mr. Faggen, wouldn't it have been more accurate to say you were considering attempting to make a program, and that you had no program in being and nothing to sell at that point?

A I said we had no program for sale at that point.

Q Where does it say that in Exhibit 3, Mr. Faggen?

A What does it say?

Q It says, "Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan for small and medium size employers."

A If we had it, we wouldn't have been in the process of programming, we would have had the program.

Q I see. What was the process other than what was going on in your imagination?

MR. COOPER: I will object to that.

THE COURT: Yes.

Q How far had you gone--

THE COURT: Just a moment, Mr. Powers. One thing at a time.

Now, don't be carried away. Just ask him a question without the comment on the end.

Q How far had you gone along in the process of programming?

A I don't recall. I didn't do it personally.

Q What did your 15,000--

THE COURT: Excuse me. Who did do it?

THE WITNESS: The people in the department, sir.

THE COURT: Fine. But you know we have heard from certain witnesses from the plaintiff whose testimony, rather generally stated, was that they don't recall any such thing, and, therefore, my question to you: Who was it?

THE WITNESS: The man in charge.

THE COURT: Fine, but who was that?

THE WITNESS: Let me think a moment. I might remember his name if I had a list. William Mosley, sir.

THE COURT: Mosley?

THE WITNESS: Yes, sir.

THE COURT: And he was the one working on that?

THE WITNESS: He was working on that.

THE COURT: Did you and he consult about this at the time?

THE WITNESS: Yes, sir.

Q Now, Mr. Faggen, Mosley was that $15,000 a year man we talked about previously, wasn't he?

A You keep referring to Mosley as a $15,000 a year man.

I had had occasion to look up on some financial statements rendered by Titan, and his salary for 1969, which is the only year I have, was $500 less for the year than your president, Mr. Castrovinci, made in 1969, so let's not belittle what his salary was. He was--

Q Is Mosley still there?

A I don't believe he is.

Q When did you discharge him?

A I did not discharge Mosley. I think he was discharged while I was sick in the hospital.

Q Mr. Faggen, I call your attention to this sentence in Exhibit 3: "We expect to provide these services to stock brokers, accountants, and lawyers only."

Now, Mr. Faggen, would it have been more accurate to say that you had not had any contact with accountants, lawyers or stock brokers, and that you were hoping when you sent salesmen out that they might like what you had to sell?

MR. COOPER: Your Honor, I believe this is such speculation dealing in semantics--

THE COURT: No, I am sorry, I don't agree with your characterization entirely. However, again we've got a confusion which you build into your own disadvantage potentially, Mr. Powers. We now know that he has testified that Mosley was working on these projects. So, for that and other

reasons, I would think you ought to make it clear, are you asking him whether he, Harold Faggen, had had any communications with brokerage houses, law firms, and so on, or to his knowledge did anybody else for the Faggen Companies have such contact.

MR. POWERS: Thank you.

THE COURT: I am trying very carefully to listen, but my patience is being tried by these unhelpful questions from your own point of view.

MR. POWERS: Excuse me, your Honor. You are being very helpful. Thank you.

THE COURT: Let's go back here now, Mr. Faggen. I will ask you, since we delay so with all these interruptions, did you at any time prior to September 30, 1968, make any sales efforts or promotional efforts with small brokerage firms or law firms in this connection that you can recall?

THE WITNESS: Sir, I didn't make sales efforts because we did not yet have it, but--

THE COURT: Well, promotional efforts.

THE WITNESS: Promotional efforts, what I did, sir, it had occurred to me, and I found later or very soon thereafter it had also occurred to others, that there was a demand for setting up pension plans, small pension plans, for small clients of many accounting firms, lawyers, and brokers,

customers, but the cost, the actuarial cost of setting it up, became prohibitive.

It occurred to me, therefore, that if I could provide this service for the smaller accounting firms, just as the Hymer Division of Peat, Marwick was supplying it for Peat, Marwick's large customers that there would be a market for it rather than for the accountants to set them up, and there would be a market for business for us, and I had discussed it with several accountants, sir.

I had also discussed with some lawyers, and they seemed to have a great deal of interest. I then discussed it with some brokers, and they had a great deal of interest. They even figured it might pay them in order to be named as investment counsel to pick up the actuarial cost of setting these up.

I had discussed the point on a number of occasions with Mr. Frank who had his roots in the savings and loan association business.

THE COURT: So this would have been in the summer of 1968 in part, at least?

THE WITNESS: Yes, sir.

THE COURT: And you told Frank this?

THE WITNESS: Absolutely. And he was very enthusiastic, and one of the first things he did was follow up on

that, and I had many meetings with savings and loan association executives.

THE COURT: That came later, I would assume?

THE WITNESS: Yes.

THE COURT: I am only interested in--

THE WITNESS: But it flowed from this, our discussions with him.

THE COURT: You see that I am trying to focus on prior to September 30, which I am using as sort of an arbitrary cut-off time.

THE WITNESS: But it was my contention I didn't think it would pay savings and loan associations, they couldn't make enough out of it, but it would pay brokers and, of course, it would be a source of revenue for accountants and lawyers, and he knew what I was talking about.

THE COURT: All right.

THE WITNESS: We had discussed all of that.

THE COURT: I gather Mosley didn't do any of this kind of thing, what Mosley was concerned about was setting up some kind of a program--

THE WITNESS: Yes, sir.

THE COURT: --from the data processing or computer technology viewpoint, is that your testimony?

THE WINTESS: Yes.

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THE WITNESS: Yes, sir.

THE COURT: --from the data processing or computer

can recall.

Q You were talking to Bache about selling your business, weren't you? They were handling the proposed merger between you and Levin Townsend, weren't they?

A That was long before.

Q What lawyers did you speak to?

A I don't recall by name.

Q What accountant did you speak to?

A I had spoken to several accountants.

Q Name one.

A Buchbinder, Stein and Company for one.

Q Did you exchange any correspondence with them?

A No.

Q Did you send them any promotional literature?

A I did not.

Q Mr. Faggen, let me read you another sentence in Exhibit 3: "The availability of packaged pension plan services at very reasonable prices will enable stock brokers to service the pension plans instead of leaving them for the insurance companies."

Now, Mr. Faggen, would it have been more accurate to say that you didn't have available any package pension plan

Honor. That's not what it says.

THE COURT: I must say I have that same problem. This is perhaps semantical, but that is still important. Besides, from your own point of view, Mr. Powers, you can put that question so much simpler and so much better.

Q Let me read you this sentence: "The availability of packaged pension plan services at very reasonable prices will enable stock brokers to service the pension plans."

Mr. Faggen, isn't it a fact that you didn't have available any packaged pension plan services at any prices in October of 1968?

A Would you read the whole statement from which you picked that sentence?

THE COURT: The thrust of the question, I think, is this.

Did you have any available package plans, let's say in September or early October of 1969?

THE WITNESS: No, sir.

THE COURT: You already told us--

THE WITNESS: I said we were in process of programming it.

THE COURT: I thought you said that but I wanted to be sure. Go on to something else.

your clients indicating year by year the number of new ones, didn't you?

A I drew an inventory of those that we had at the time that Mr. Kaufman and Mr. Frank and I went through the client ledger.

Q But the inventory was phrased in terms of new in 1968, new in 1967, and so forth, wasn't it?

A That's correct.

Q Mr. Faggen, wouldn't it have been more accurate to tell how many old ones were lost in each of those years?

MR. COOPER: I will object to that, your Honor.

THE COURT: Yes, accuracy is not really your point. It's a long word. Second of all, because of that and other things, again, it's confusing, and I don't know why you need to do it this way.

Q Mr. Faggen, why didn't you include in Exhibit 3, along with the new ones year by year, a list of the ones you lost year by year?

A I told you that we went through the client ledger which contained all of them, and what they asked me to do was draw an inventory of those that we had at that time, reflecting what they had seen in the client ledger.

Q Is your testimony essentially that no one asked you

A They were in the client ledger if they turned pages.

Q Mr. Faggen, you knew by the time you got into this contract that if you omitted something material you were violating the contract, didn't you?

MR. COOPER: I object to that, your Honor.

THE COURT: Let's remember what paragraph 3 or clause 3 of that contract says, and let's remember, also, that unless I have missed something, Mr. Faggen is not a lawyer, and let's remember, thirdly, we are getting close to something that the Court, rather than you and Mr. Faggen, will have the sad duty of deciding here.

MR. POWERS: I understand with one correction, Mr. Faggen is a lawyer.

THE COURT: Maybe he is, but I muffed that. Are you a lawyer, Mr. Faggen?

THE WITNESS: I have a law degree that was awarded me in 1930. I have never practiced law.

THE COURT: All right.

Q You are admitted in Virginia, aren't you?

A That's correct.

THE COURT: In any event, accepting that as a correction, which I do with alacrity, Mr. Powers, there is still a better way of asking the question.

of the contract which is annexed to your affidavit, and ask you if you were aware that provision was in your contract:

"Material misstatements or omissions. No representations or warranties by the seller in this agreement, nor any document, statement, certificate or schedule, furnished to Titan pursuant hereto or in connection with the transactions contemplated hereby, contains or will contain any untrue statement of a material fact necessary to make the statements or facts contained therein not misleading."

Were you familiar with that provision of the contract, Mr. Faggen?

A Are you asking me whether I read it?

Q Yes.

A Yes. But as far as interpretation, and so forth, I thought I had very competent counsel, Mr. Sheib, who handled all the legal matters in connection with this.

Q Do you recall saying that the $50,000 salary ceiling for you was discussed for the very first time between you and Kaufman at that meeting on October 2? I think you testified to that yesterday, if I recall.

A That is correct.

Q Mr. Faggen, didn't you say something different in your affidavit at 472-A of the appendix, which I would like

"An adjustment of $25,700 for Harold Faggen's salary was made for both statements. I had been paid a salary of $75,700 during the fiscal year, but I had agreed with both Diebold and Titan that my salary would have been only $50,000 a year if either company had operated the business."

Now, you discussed that $50,000 ceiling with Kaufman when you presented the Diebold memorandum, didn't you?

A No, I did not discuss it with him.

Q It was in the memo, wasn't it, the $50,000 ceiling on salary?

A No.

Q Do you want to look at Exhibit 1?

A It is not in the memo.

Q Let me show you Exhibit 1. What's that item, salary adjustment $25,700?

A Item of salary adjustment, you will notice there are three items of salary adjustment.

Q I am asking about yours, sir.

A I will answer this if you want a complete answer. There are three items of salary adjustment on that page. There is an item of $25,700 on Harold Faggen, there is $22,950 on Rose Dogan, and $13,162 on George Stewart, because the way Rogoff was figuring his year, his year was the period ending June 30, regardless, and he said as far as I was concerned,

if I had 75,700, 50,000 of that would have been used up by June 30, and the balance would go towards the next $50,000 in the second half.

For Rose Dogan, $22,950 would have been used by June 30 and the other part, the 22,950, which is to pay her for the balance of the year, would go in as a loan or deferred item the same as you notice the $25,700, and the same thing for George Stewart, since all three had been paid.

The problem was that Rogoff was treating a year as one thing, and something which I don't believe anybody could have agreed with. This was one of the problems with the Rogoff method of handling that. He wanted to treat a year as whatever happened at the period ending June 30.

Q Mr. Faggen, are you now testifying that you wish to withdraw the following statement you made to this Court at 472-A of your affidavit: "But I had agreed with both Diebold and Titan that my salary would have been only $50,000 a year if either company had operated the business"?

A I am not withdrawing. What I would like to do is to that the definition of a year by these two organizations was something different. Each one had its own idea. Because if you followed the Rogoff statement, Rose Dogan's salary for a year would only have been $22,950, and clearly no one intended that.

Q Mr. Faggen, Rose Dogan was part of the compensation package here, wasn't she?

A I don't know what you call "compensation package."

Q She was an integral part of the compensation arrangements, wasn't she?

A Yes.

Q Do you recall discussing the adjustments in Exhibit 3 with McIntyre?

A Exhibit 3 being what?

Q This memo.

A Yes, I do.

Q Do you recall having a discussion on that with McIntyre?

A With respect to 1968.

Q And the discussion was limited to one year, is that right?

A That is correct.

Q And you gave him some explanation of your various adjustments for one year?

A I explained whatever questions he had, and he was limiting his questions to the one year.

Q And you didn't give him anything in writing on those adjustments, did you?

A No, I did not.

Q And McIntyre accepted what you said, didn't he?

A He did accept. He didn't just listen to me. He looked at a number of things.

Q But he took your word and trusted you, didn't he?

MR. COOPER: I will object to that.

THE COURT: How can he answer that? I don't understand.

Q You read McIntyre's deposition, didn't you? Let me read to you what he said, Mr. Faggen, and you tell me if this is accurate.

MR. COOPER: Where are you reading from?

MR. POWERS: Page 56.

"Q You took him to be an honest and truthful man, didn't you?

"A Yes.

"Q And you accepted what he told you orally, is that right?

"A Yes.

"Q Did Tony Frank accept what Faggen told him orally?"

MR. POWERS: Read the objection.

"MR. COOPER: I object to that."

MR. COOPER: I do, and I repeat the objection.

"A I don't know."

THE COURT: I think that is hard to follow. What is the point of all this, Mr. Powers? We can't ask somebody who is not involved what that somebody was thinking.

Q You know the Mason Tenders went into receivership through an insurance department procedure in 1968, didn't you?

A No, I did not.

Q Didn't you hire the Robinson-Silverman firm to protect your interests in that matter?

A I don't know what you mean by protecting my interests. I wanted to know whether there were any statements about our organization.

Q I show you a document which has not been admitted in evidence, 26 for identification. It says in July 1968 the Superintendent of Insurance--

MR. COOPER: Wait. This document is not in evidence.

MR. POWERS: I am going to question him on it.

THE COURT: Look, Mr. Powers, I don't understand how you can really certainly fail to understand this after eight days of trial. You don't have to do that. You have shown him the document. It is not in evidence. I know exactly what it is. What is it you want to know?

Q Mr. Faggen, didn't you hire the Robinson firm because the insurance department had brought the receivership proceed-

ings in court in 1968?

THE COURT: First of all, let's find out if he hired the firm. The question really comes down to this, Mr. Faggen:

Having been shown this document, does it refresh your recollection as to whether or not you retained the Robinson firm in connection with this affair?

THE WITNESS: Are you asking that, sir?

THE COURT: I am.

THE WITNESS: I am sorry. I thought you were speaking to Mr. Powers.

I did, sir.

THE COURT: All right. Next question, Mr. Powers.

Q And ultimately you lost Mason Tenders as a client, didn't you?

MR. COOPER: I will object to that.

THE COURT: This was after the acquisition, Mr. Powers, correct?

MR. POWERS: Right.

THE COURT: Rather than badger him with that subjective type of question, I certainly allow whether or not the Mason Tenders ceased being a client of the Faggen Division of Titan.

MR. POWERS: That is the question.

THE WITNESS: Your Honor, may I, since you asked this, may I just your question, your form of question.

THE COURT: Don't worry, Mr. Faggen. I am only ruling on what I consider to be obscure, disjointed, improper questions. That is my burden here. That is all I am doing. You don't have to worry about this.

The question, so as to save time, rather than to put it in Mr. Powers' lips and then have him translate it, and so on, in his own way, is simply this. Apparently he wants to know, did there come a time, to your knowledge, when the Mason Tenders ceased to be a client of the Harold Faggen Actuarial Division of Titan Group, Inc.?

THE WITNESS: Yes, sir.

THE COURT: When was that, if you can recall?

THE WITNESS: I don't recall, but it must have been at least two years after.

THE COURT: You don't have to guess.

Next question.

Q You knew there was an insurance department report on Mason Tenders that made comments about the Faggen services, didn't you know that?

A The insurance department or the banking department of the State of New York must make an examination of every jointly

administered fund in the state at least once in five years.

THE COURT: You don't have to argue with him, Mr. Faggen. I don't blame you for feeling the way you do, frankly, but you don't have to argue with him.

What's the question, Mr. Powers, that you really want here?

THE WITNESS: I just don't understand.

THE COURT: Let me remind you, before you put it, I have to be involved with an organization where the insurance department of the State of New York critizes it from time to time. It is an eleemosynary institution, and it is one of the great institutions of the Western World, and if you think you are scoring brownie points getting into this subject, I submit to you that I can't conceive of a more irrational argument from your point of view and that of Titan's, but if you want to press it, give a question which Mr. Faggen can understand and answer, and I can understand when he does answer it.

Q Mr. Faggen, you knew there was an investigation of bribery and other wrongdoing in Mason Tenders, didn't you, in 1968?

A I don't know if it was in 1968. I learned that that was part of their investigation, and that was the reason I wanted the Robinson firm to keep on top of it to find out whether in any way there was any charge involving my organiza-

tion, and I was given a report that there was not.

Q In 1968, proceedings were brought in court, weren't they?

A I had nothing to do with proceedings.

Q But that's when you asked the Robinson firm to look into this for you, wasn't it?

A In 1968.

Q And did you make any disclosure of that matter to Titan?

MR. COOPER: Which matter?

Q The Mason Tenders, and your being actuary for them, and hiring the Robinson firm to protect your interest. Did you make any disclosure of that to Titan orally or in writing?

A I don't know how I can--

Q I think it calls for a simple yes or no, Mr. Faggen.

A I don't know what you call disclosure. The fact that I retained the firm that were Titan's lawyers--

THE COURT: In order to advance this, from your own point of view, Mr. Powers, you simply don't seem to have the faintest notion of the

Again, to move this along, Mr. Faggen, counsel, I

that is this. Apparently he wants to know that if at any time did you tell Kaufman or Frank about this investigation of this client, Mason Tenders?

Obviously, you didn't have to tell Ben Robinson because, presumably, he knew, right?

THE WITNESS: That's right.

THE COURT: So, let's confine it, first of all--

THE WITNESS: I did not because I have nothing to tell. Every client is investigated.

THE COURT: Please don't think because I am asking questions that means I am blaming you for anything, that is not my point.

THE WITNESS: I don't understand.

THE COURT: My point is to move this already hugely overtried case along. Now, listen carefully. I am not trying to criticize you or infer anything. I simply want to know, do you recall saying anything about this either orally or in writing to Kaufman or Frank?

THE WITNESS: No, sir.

THE COURT: Anybody else you want me to add to that, Mr. Powers?

MR. POWERS: No, your Honor. Thank you for asking.

weren't you?

A Yes.

Q Do you recall his testifying to a meeting with several of your consultants, including Ferrara, and including Tabor, in May of 1968? You remember that testimony, don't you?

A Yes.

Q And you recall Mr. Ferrara saying there that you told the employees that if you entered into any negotiations for the sale of the company with anyone, you would tell them about it, is that right?

MR. COOPER: Is that right, what he heard?

Q Did you hear Mr. Ferrara say that?

A I don't recall. If you say that's what he said--

Q Is that a correct statement, that you told the employees you would keep them posted?

A Not at all.

Q What did you tell the employees at that meeting?

A That meeting was called because I had been talking to Levin-Townsend, and there were spreading rumors that I was immediately going out of business and selling everything to Levin-Townsend, and I told them that there was nothing that I had to report with respect to the Levin-Townsend, and if

them as anything happened, if it did.

Q And is it your testimony that Mr. Ferrara is not speaking truthfully in saying you undertook to tell the employees about any negotiations, not just Levin Townsend, but any negotiations?

A If he said that I undertook to tell them about any negotiations, he was not speaking truthfully.

Q Now, Tabor was an unhappy employee for a substantial period of time in 1968, wasn't he?

A I don't know what an unhappy employee is. I never asked him whether he was happy or unhappy.

Q Tabor wanted to be president, didn't he?

A At least. Chairman of the board, if he could.

Q Let me read you a question and answer on page 490 of your deposition and ask you if that testimony was truthful when you gave it:

"Q So you don't recall his reaction but your inference from knowing Tabor is that he was unhappy?

"A Tabor throughout the years that he worked there always felt that he was underpaid, underrecognized, underauthorized, and under everything."

Do you remember giving that answer? Was that truth-

Q Tabor was the one who walked out December 16 with over $100,000 worth of clients, wasn't he?

A I don't know how many clients he walked out with, but he and another consultant took a number of clients sometime the latter part of December.

Q Did you make any disclosure to Titan that Tabor was a consultant with this many clients and that he was unhappy?

A I told you I didn't know that he was especially any differently unhappy then than he had been for ten years prior to that, or about ten years, so I wouldn't have known whether he was happy or unhappy. I am not a psychiatrist.

Q Let me read you the following questions and answers on that subject, and ask you if they were truthful at your deposition. Page 491.

THE COURT: Do you suppose we could interrupt you at this point to take the morning recess?

MR. POWERS: Yes, sir.

(Recess.)

Q Mr. Faggen, I would like to read to you some questions and answers from your deposition and ask you if that continues to be your testimony today. Page 490:

"Q What was the basis for those feelings as he expressed them?

the company. Nobody else agreed with him, but that was what he felt."

Do you remember giving that answer?

A Yes.

Q And that is truthful?

A Oh, yes.

Q Page 491:

"Q You made a couple of comments to give me more of a background of Mr. Tabor off the record. Let me ask you a couple of questions just so we can clarify the facts I need.

Would you say you had some continuing difficulties with Mr. Tabor, both in terms of job performance and in his requests for increased recognition?

"A Well, when you say "difficulties", they weren't really difficulties because they had been going on for years. They were normal operations with him.

"Q He wanted to be president, I take it?

"A At least.

"Q You didn't feelhe was qualified?

"A That's putting it mildly.

"Q And you had so indicated to him, is that correct?

Now, is that testimony truthful?

A Yes, sir.

Q On page 493:

"Q He was not one of your favorite employees, I take it?

"A That's right.

"Q Would it be fair to characterize your relationship with him in '68 as being one of staying at sufferance, so to speak, on your part?

"A No, it had been the same--"

MR. COOPER: I object to that question.

Never mind, I withdraw the objection.

MR. POWERS: I will reread the question.

"Q Would it be fair to characterize your relationship with him in '68 as being one of staying at sufferance, so to speak, on your part?

"A No, it had been the same for years. I don't think the '68 relationship was any different than the '67 or the '66 or the '65 or the '64.

"Q He was a difficult employee?

"A That's your definition.

"Q I mean, is that accurate?

"A I don't even want to characterize it as that.

"A He obviously had a lot of problems that were none of my business, and I think they stood in the way of his ever being a very valuable employee.

"Q How many clients did he handle?

"A I don't recall.

"Q I show you a list of the clients that went with him. I will read them off to you, and then I am going to ask you if you recall any others."

And then there is a lengthy list.

"A May I interrupt because I don't recall these things and you can go on reading them and it won't mean anything."

Now, was that truthful testimony?

A Yes.

Q And now on page 499:

"Q Did you ever tell Kaufman or Frank about Sol Tabor before October 2?

"A Tell them about what?

"Q Did you tell them anything about him? Did you even mention his name?

"A I don't recall. I don't know that there was anything to tell.

"Q Did you tell Kaufman or Frank that Sol Tabor

"A We never discussed that, but it is implicit in the fact that you have how many consultants?"

Do you affirm that testimony as being truthful, Mr. Faggen?

A As far as it went, yes.

Q Now, Mr. Faggen, were you here in Court when Abraham Zide was testifying?

A Yes.

Q Do you recall his stating that you prepared some figures on pension costs in handling the pension funds of the Furniture Workers and that you recommended that the ten million or so funds of the Furniture Workers be transferred to another bank? Do you remember that testimony?

A I remember he testified I recommended the transfer to another bank. I don't recall anything about preparation of figures.

Q Do you recall he testified that you recommended that it be moved to First National City, is that right--excuse me, to Chase Manhattan Bank?

A That's correct.

Q That was truthful on the part of Mr. Zide, wasn't it, you made that recommendation?

A I don't know whether I initiated it. I certainly concurred in it. I thought it was a money-saving step.

Q Mr. Faggen, let me call your attention to how you testified to it at your deposition, page 529:

"Q The Furniture Workers Pension Fund, the funds that had to be invested"--

Strike that, let me start over.

"Q Was it at Ben Robinson's suggestion that it be moved?

"A I don't recall the circumstances under which Chase--

"Q Do you recall the date?

"A No.

"Q Was it your suggestion that they move those monies?

"A I don't think so.

"Q Excuse me.

"A I'm pretty sure not. I don't think so. I am pretty sure not."

Do you remember giving those answers at your deposition?

A I think so.

MR. COOPER: I don't understand these questions and answers, reading from the deposition. If they are read for the purpose of impeaching, they are certainly not impeaching.

If they are asked for the purpose of

mony, the witness has already answered.

THE COURT: Whether or not they impeach, I will have to decide.

Q Now, Mr. Faggen, do you recall hearing Zide testified about the circumstances under which new counsel were selected for the Furniture Workers Union, don't you? You remember that testimony?

A Yes, I do.

Q And do you recall Zide stated that you recommended that they move to the Robinson firm because they needed a bigger and more qualified law firm, is that right?

A That's what he stated.

Q And Zide said that the Furniture Workers never knew the Robinson law firm before you recommended that they hire them as counsel, is that right?

A That's what he said.

Q Was Mr. Zide telling the truth, Mr. Faggen?

A He may have been telling the truth as far as he knew, but I don't know how he could have known whether the president and other officers of the Furniture Workers knew of the Robinson firm. After all, he was not an officer.

Q But you specifically recall his testifying that it was your suggestion that the union move to the Robinson firm? Do you recall that testimony?

A He so testified.

Q And was that the truth?

A It was not.

Q You testified contrary to Mr. Zide at your deposition, too, didn't you?

A That's correct.

Q And you said at page 219 the following--

MR. COOPER: Your Honor, wouldn't it be more appropriate to ask the witness questions here rather than to read from the record unless it is contradictory?

THE COURT: From my point of view, it would be more effective, but that is not the test. Mr. Powers apparently thinks otherwise, and I am going to give him the latitude.

Q I am reading from page 219, and I will read the tail end of the answer, of Mr. Faggen:

"And I pointed out a meeting at 3 o'clock p.m. United Furniture Workers re convention.

"Q Did Ben Robinson go to that meeting with you?

"A No. He wouldn't have gone. He had nothing to do with it at that point, but--

"Q Do you recall what you saw him about that day?

"A No, I don't. I said I was speculating that it may have--I am speculating only as to date--things happen. Whether it happened on that date or around that date, it

was a question of the United Furniture Workers needing other counsel and they were--they wanted to contact the firm because they knew of him, but they were reluctant because of their monetary limitations, and without causing any embarrassment to anybody, I remember at one point they asked me to sort of feel him out."

Now, Mr. Faggen, in light of Mr. Zide's testimony, do you continue to stand by your testimony at pages 219 and 220 of your deposition?

A Yes, I do.

Q Did you testify at page 221:

"Q Now, do you recall what you spoke to Robinson about that next Saturday?

"A No.

"Q Do you recall what you said to him when you told him about these discussions with the Furniture Workers?

"A I told him that they had been functioning with a one-man legal firm and the fund had been rapidly expanding so that they were then in a position where they needed representation in several areas at the same time, and the lawyer they had was--don't know whether to call it unwilling or what--was not able to handle them as they had to be handled. That was their complaint. They felt they were having difficulties and were looking

around for a firm of lawyers. They knew of the Robinson firm. That was one of the names thrown out. I don't know what others may have been, but they had always thought of them as very expensive, and the Furniture Workers were also 'poor'."

Now, in light of Mr. Zide's testimony, do you continue to affirm that answer you gave on page 221 and 222 of your deposition?

A Yes, I do.

MR. POWERS: Nothing further, Mr. Faggen.

MR. COOPER: I have no questions, your Honor.

THE COURT: Thank you, Mr. Faggen, you may step down.

(Witness excused.)

MR. COOPER: That is the defendant's case, your Honor.

THE COURT: Incidentally, harking back to the colloquy which we had last evening re the McIntyre deposition, I know in checking through my papers and the exhibits that it would appear that the McIntyre deposition is already in evidence.

MR. COOPER: I don't think so, your Honor.

THE COURT: I had not thought so, but--

MR. COOPER: His affidavit is. It's part of the

appendix.

THE COURT: We have here Plaintiff's Exhibit 27, which is a transcript of the McIntyre deposition taken on September 26.

MR. COOPER: That was for identification only, your Honor.

THE COURT: Somebody drew a red line through the Id.

MR. POWERS: I thought your Honor said you were admitting the subject--

THE COURT: That is my intention, subject to getting some kind of an understanding for as to what you want to cover.

MR. POWERS: I am prepared to do that.

THE COURT: And second of all, to hear you once I hear precisely what portions of the deposition you want to offer. I call to your attention, however, that I have before me Plaintiff's Exhibit 27 with the Id. crossed out. I am not doing this for any reason other than to alert you to this so that you can tell me what your version is.

MR. POWERS: Sir, I can give you those pages now on the record. I can read them into the transcript.

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meating those portions of it.

THE COURT: That I think is probably correct. But I press you, and I think you must give to Mr. Powers and to me the portions you want in, and I don't want you to read them.

MR. POWERS: I will be ready to do it any time you want me to.

THE COURT: I don't want any machine gun language which I can't understand or any dictating into the record because that is not what the exercise is about.

MR. POWERS: I will prepare a list of the pages next week, submit them to my adversary--

THE COURT: Copy to me, all right. Good for you. I think that is a good way of doing it.

I would be prepared to hear you gentlemen next Tuesday, but I rather believe I am going to be told there will be some constitutional or other infirmity in that proposal. I propose we convene on a convenient day for oral argument and then I will either rule by dictating my opinion from the bench or I will reserve decision, I don't know which, but I want to hear your findings. It is true you have submitted

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THE COURT: Mr. Cooper, I think you have a problem here.

MR. COOPER: What time would you want us to argue, your Honor?

THE COURT: I am sort of leaving that up to you, but first of all, I want to find out if Tuesday is all right.

MR. COOPER: I want to make it. In other words, whatever else I have, I will put aside or get an excuse. I may be on trial somewhere else. I want to be able to tell them--

THE COURT: That's why I am concerned, because you told me that off the record yesterday, that you were being waited for by some judge in Queens or wherever.

MR. COOPER: Yes. What I would like to do--I am sure that if I tell them this case has been on trial and that we have an argument set, if it's possible, if your Honor can take us, let's say, at 3 in the afternoon, or else the first thing in the morning, I will get them to arrange for me to come over there either earlier or later.

THE COURT: Would Wednesday be any better?

MR. COOPER: If I am on trial, it will be the same.

(Discussion held off the record.)

We have just agreed that we will hear final argument on either Tuesday morning of next week, the 19th, at 10:30 o'clock, or on Wednesday morning, the 20th, at 10 o'clock, and Mr. Cooper has agreed to call your office, Mr. Powers, and my office later today, as soon as he checks his calendar.

MR. COOPER: All right.

THE COURT: Now, I have the exhibits here. Apparently you don't have copies of many of them. I would like to keep them but, on the other hand, I can see your problem, too, and I better honor your problem first. What is your pleasure on that?

MR. COOPER: I think I know what each of those exhibits contains, so I don't have any need for the exhibit, itself. Most of the exhibits are already part of the appendix, and a few of them--

THE COURT: Why don't I hold the exhibits, and if either of you want to refer to them in advance, why, please feel free to come in or whatever, send somebody in or whatever you want to do.

MR. COOPER: Two things. When I get the list from Mr. Powers as to what of Mr. McIntyre's deposition he wants, may I submit a similar list of what I would want read in after

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MR. COOPER: Secondly, with respect to Tuesday or Wednesday, will it be in this courtroom or in chambers?

THE COURT: In this courtroom.

MR. COOPER: Okay.

THE COURT: After all the badgering here, I never thought you would really make it.

(Adjourned sine die.)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

1050

TITAN GROUP, INC.,

Plaintiff,

vs

72 Civil 1797

HAROLD FAGGEN,

Defendant.

New York, N. Y.

March 19, 1974

Before

HON. HAROLD R. TYLER, JR.,

District Judge

APPEARANCES:

POWERS & GROSS, Esqs.,
Attorneys for Plaintiff
LAWRENCE M. POWERS, Esq., of Counsel

BURTON COOPER, Esq.,
Attorney for Defendant

MR. POWERS: Your Honor, I have a list of those excerpts from the McIntyre deposition which I have served on Mr, Cooper.

MR. COOPER: Your Honor, I received that just about ten minutes ago and have been trying to scan what it was Mr. Powers wanted. I don't think I can do it that quickly. However, in view of this, I withdraw my earlier objection to the introduction of the entire deposition, and I have no objection to the entire deposition now being in evidence, your Honor.

THE COURT: Do you accept that, Mr. Lawrence Powers?

MR. POWERS: Yes, sir.

THE COURT: Then we will deem what we know as Plaintiff's 27 to be in evidence in its entirety.

MR. POWERS: One other thing. There are references in the depositions to certain deposition exhibits. Those which are not in evidence in the trial I have annexed to this paper you have before you, your Honor, and one exhibit in the deposition, entitled H, is an exhibit at the trial. It is denominated Exhibit 3-B.

THE COURT: Yes. I recognize that. How could I miss it?

Now, Lawrence M. Powers, what do you say about this

might comment on something first of all that neither of you has raised, and that is the tender subject of jurisdiction. I hope and trust you have read the relevant section of the '34 act and Rule 10(b)(5) thereunder, and, second of all, as you know, Mr. Powers, the defendant has always claimed that this suit is time barred, and I don't think I need to delineate their arguments in a plethora of detail, but suffice it to say, as I understand their argument, it comes down to this, that we look first to the law of the jurisdiction, that is, New York law in our case, but then they point to the fact that although there is a six-year statute generally, New York statutory law permits contracting parties, as I will call it for short, end that period, and they claim that was done in the relevant portion of the contract here, and, ergo, Titan is time barred.

I want to hear you on that one, also.

MR. POWERS: Shall I address myself to those issues of law before I go into the facts?

THE COURT: Suit yourself. I just want to flag those two points that in the process of trial we all understand that we sort of put aside in our mind, as well as deeds or statements.

MR. POWERS: Let me meet them first.

On the jurisdictional point, Section 27 of the

Securities and Exchange Act of 1934 gives exclusive jurisdiction to the Federal Courts for any action brought under the statute. This being an action brought under 10(b)(5), I believe it is properly brought under Section 27.

The jurisdictional section of the 1933 act which would embrace the same cause of action here under 17(a) gives jurisdiction either in the Federal Courts or the State Courts concurrently, and it is equally a proper ground for jurisdiction of this Court.

THE COURT: Wait a minute. All of that is generally true, but that really doesn't get down to the point.

Remember, both the rule itself, which in turn is squarely grounded on the statute, says it will be unlawful for any person or firm directly or indirectly, by use of any means of interstate commerce or of the mails or of any facilities of national securities exchange.

MR. POWERS: Yes, sir.

I think we have clearly established here the use of both interstate and intrastate telephone calls, both of which -- conversations between Mr. Faggen and Mr. Kaufman setting up the meeting of October 2, telephone conversations in New York City, and, as your Honor recalls, intrastate telephone calls fall within the ambit of Section 27.

In addition, we have use of the mails in the trans-

mittal of various documents, including the Joseph Warren financial statements, which ultimately were referred to in the contracts. They were transferred to the Robinson law firm for ultimate transmittal to Kaufman on the West Coast, and we also have mailings.

THE COURT: The first draft was mailed from Kaufman to New York.

MR. POWERS: That draft was mailed to Simon Sheib, with a covering letter by Michael Rosen, which was testified to.

The second point is, we also have a good common law case of fraud here, because, as I expect to show in my summation, the factual misstatements and omissions are so fundamental to the basic business deal and the scienter to be inferred from the conduct of Mr. Faggen --

THE COURT: Wait a minute. I thought you were going to take up the statute of limitations.

MR. POWERS: I was going to finish on jurisdiction.

THE COURT: If that is all you have, you don't belong here.

MR. POWERS: I don't want to bicker with you. I just want to make it clear we have diversity of citizenship on a good common law fraud case here. Mr. Faggen lives in New York. Titan is registered in Delaware.

THE COURT: I see your point.

MR. POWERS: On the time bar question, we have a six-year statute of limitations for any application under Rule 10(b)(5) and, I submit, under 17(a) of the 1933 act as well, and that has been established in a number of cases. That statute of limitations can't be waived by contract or modified by contract any more than any other rights under 10(b)(5) can be waived or modified by contract.

Your Honor took a very strict construction of Section 29 in one of the cases I cited to the Second Circuit. I think Cohen versus Tenney. I think that was one of your decisions, and just as you can't possibly foreclose a person from suing by express waivers on facts or waivers on documents in a contract, you can't foreclose him from suing by waiving the period of time he has within which to discover and bring his action, and I think that the non-waiver statute under the 1934 act -- and it is analoged under the 1934 act -- would both bar a contractual time bar here and, by inference, would bar taking that contractual time bar, then using the New York statute of limitations, which is three years, to preclude this.

In addition, you have a lulling feature of this case and a failure to discover the fraud, and even if there were a three-year time bar here, under I think it is Holme

versus Armbreck, a Supreme Court case, the Federal securities fraud count is tolled until we discovered or should have discovered the fraud, and I think the evidence here is clear that the essential discoveries were made late summer, fall of 1971 and that the intensive investigation began at that time, and the key element of proof on that is a document that Mr. Cooper wanted in the record.

When Frankel was making an inquiry of Kaufman to say, "How did you buy this thing? How was it priced? What were you thinking about when you bought this thing? What were the negotiations leading up to it?" -- that was the October '71 letter.

So if there is a three-year time bar, it can only start in October '71, and we brought suit six, seven months later.

THE COURT: I see your point, but let me point this out to you:

It could be argued from the defendant's point of view that this isn't a classic instance of where the plaintiff was lulled at all. Rather, the proof shows that this suit was motivated by the declining fortunes of Titan as a whole and a sharp crescendo of personal animus, perhaps aided and abetted by both parties, between Robert James Frankel and Harold Faggen, beginning in the spring of 1971 and continuing

up until May of 1972, and that actually nobody lulled anybody, that Frankel's mission was to come into this company and look for scapegoats and get some cash and cause some trouble.

But what happens then if the fact finder were to accept that kind of an argument? I understand your legal analysis, and I am inclined to agree with you as far as it goes, but I am not sure what I feel I anticipate may be an argument on the defense.

MR. POWERS: I would like to probe a little deeper.

The kind of dossier involved here, this volume, the depositions, much of which has been put into trial and the trial itself clearly, clearly shows you how and when Titan found out it was defrauded.

First-off, you have Frankel really running around in circles in the summer of 1971, trying to find out what he could about the Faggen acquisition. You have the first serious inquiry letter, where he gets into the meat of the issue to Kaufman in October of 1971 and some of the documents in Kaufman's hands.

The next contact point with the fraud is when I get hired, around Christmastime of 1971, and start doing an inquiry from the documents that Frankel has and reach certain conclusions that need more definitive inquiry.

At that point, Titan tries to undertake for the first time an audit of the Faggen companies for the four years before the transaction, and they are forestalled at every step of the way until Faggen himself gets sick and some of Titan's accounting personnel get in there and start looking at the raw data.

Even then, their conclusions aren't fully developed, and they don't have all the documentation, but they have enough so that Titan reaches the conclusion that it has been defrauded and immediately starts an action. That accounting inquiry is going on in April, within weeks and days of the actual filing of the action.

After we file the action, the whole story first begins to come out. We didn't know more than thirty per cent of what was brought out in this courtroom when this action was filed, and the whole story came out first by Fagan's motion for summary judgment, which was a very misleading affidavit as to the negotiations.

THE COURT: I will agree with you. Everybody's affidavits on that motion were misleading, to put it kindly.

MR. POWERS: We come to mid-summer, and after some aborted discussions between the parties to resolve their

to additional witnesses who have something to supply, and the story first really begins to come out in its full flavor in the winter of 1972, when the thing is argued before Judge Ryan.

McIntyre's information pops up for the first time in Mr. Faggen's reply papers. An explanation of the so-called Diebold memorandum pops up for the first time in Faggen's reply papers, and an attempt, I submit artificial, to reconcile the Diebold memorandum where the figures used in Exhibit 3 come out in Faggen's reply papers.

So, we first begin to really understand and develop our fraud case while we are in the midst of it. I think Titan had a duty to file suit in the spring of 1972 with the information it had, but I don't think you can say that they knew the whole story before then or any appreciable period before then.

THE COURT: You are missing my point entirely, and it may be my fault, because I haven't put it precisely.

Let's stick to the testimony of your client, Mr. Frankel. Without swerving one bit from what he testified to, one could infer, on behalf of the defendant, that what really

was going to happen, the perrenial cash shorts confronted the company, and we have the meeting in the spring of 1971 at the Yale Club, of all places, and from then on one could analyze just from the testimony of Robert James Frankel that things went from bad to worse.

Do you remember, he told us about how he tried to get Faggen to contribute more cash, and Faggen said, "Wait a minute. When I sold to Titan they took out between two and 2.3 million dollars. Why ask me?" -- and so on and so on.

So, what I am really concerned about is this: if one takes that view of that kind of evidence to suggest that when Faggen wouldn't play ball with Frankel's new ideas, and because everything was doing so poorly, including the Faggen companies, at least in terms of expectations they weren't doing so great, except on the actuarial side, that really this wasn't a lulling job at all. It was an after-the-fact scapegoat hunt.

MR. POWERS: Let's stay with that last meeting, your Honor, where Frankel was actually reading from contemporaneous notes of the meeting.

THE COURT: Forget what he was reading from. I just want you to understand what I am trying to push you on.

dollar deal from Diebold. I passed that up --

THE COURT: I don't want to hear that. I know you can say all kinds of nasty things about Faggen. I am not asking for that. What I am asking about is this time bar defense, and if one takes a view of the facts that this was really not a lulling situation, where if so I would quite agree with your analysis of the law, but supposing the fact finder says, "Oh. no. The defense was right. This was a witch hunt after the fact." Then what does one do under the law with this time bar defense?

MR. POWERS: I think the essence of the issue is, when did you know or have reason to know that you had been defrauded? The reason you start looking to see if you have been defrauded is irrelevant. The idea of fraud is when somebody lies to someone --

THE COURT: No. Forget that for a moment. Let's assume for the moment -- I know you want to get off into this, and I wish I never asked it, because you don't want to stick to what I am asking.

Supposing one takes the view which I assume Mr. Cooper is going to argue for Harold Faggen, that this was no lulling operation at all. Quite to the contrary. Titan

previous management -- Oh, there may have been certain details that didn't work out as all had hoped or that Harold Faggen himself argued they would, but nevertheless on balance the actuarial division of Titan -- excuse me -- the Faggen Group, was probably doing better than most of the divisions in Titan, and it was only when Frankel came in and he suddenly found out that Faggen had made a deal which wasn't quite the same deal he made when he sold Sovereign to Titan, and there is an albatross around his neck, and Titan was 5.5 million dollars worth of convertible debentures, and that there was no likelihood of conversion, because the average conversion price was 19 bucks, and good old Titan, if it was selling for anything at all, was selling for so far below that it was ridiculous.

That is the kind of argument whether the facts or not support is important, but you better be recognizing that there we might have to take a different view of the law.

MR. POWERS: Isn't every fraud discovered first because of a business negative, a business disaster, a downturn that makes you wonder what you bought?

THE COURT: I agree with you, arguendo, at least, that could well be. I am not taking the defense side of the picture. I am just trying to demonstrate the kind of argu-

answer to it is under the law.

MR. POWERS: I think the answer to is, if you didn't know or shouldn't have known that a fraud had been committed up until the point that you started looking, we don't begin to run the statute of limitations until the point when you started looking.

THE COURT: Or, put differently, even assuming arguendo that there was animus and bitterness here, if there was in fact a reasoned inquiry which in fact did discover fraud in the inducement, that is the end of the matter, and we can go back to your analysis of the law.

MR. POWERS: Let's take it back to the furthest possible point, February '71. Frankel goes on the board. I am arguing it from your side of the issue, as you have explained to me. Frankel goes on the board. He looks at a balance sheet, $5,500,000 in debt to be paid. He wants to know, "What did I get for my money?" That is February of 1971.

Three years from February 1, 1971 gives us until 1974 to bring this case. This case was brought May 1, 1972.

THE COURT: All right.

MR. POWERS. The other element is what happened within Titan. The only people with any continuity in Titan

powerful members of the board of directors.

THE COURT: Even if one says Frankel was a little over-zealous and a little bit too bitter, the fact of the matter is, the controlling management up until that point had really been oriented all for Faggen.

MR. POWER: Right. The other element here is, how do you discover you have been lumbered when you buy a whole company? It is not the same as buying a loaf of bread and finding it is stale. You have a company which presumably earned $570,000 pre-tax. Here is a closing on September 2, 1968. You don't begin to find out you have been lumbered until you have had at least a whole year of audited earnings going by.

The first audit you have comes out in March or April of 1969 -- of 1970 -- excuse me. Because of all of Vital's internal problems, the Court can take judicial notice that their audited earnings never came out on time. They were in big trouble in 1970.

THE COURT: You bet they were.

MR. POWERS: Then we hit the summer of 1970, and there is a palace revolt, and Kaufman is saying for the first time, "I am worried that the Faggen companies aren't going to earn enough to pay their interest," but nothing more is

board, and so is Robinson, and Harold Faggen is making the same kind of glowing expectations and outlines of what is going to happen next at the same board meetings that he is making to Frankel the following summer. It is the same sales talk throughout the years of their relationship.

THE COURT: You have made that point before, and you have made it every day since I have met you.

MR. POWERS: Let me turn to the merits.

There are three fundamental misrepresentations-omissions that we rely on in the case, and I think they are valid under 10(b)(5), 17(a) of the '33 act and old common law fraud as well. The three are the client lists, the computer capabilities and the earnings, and I want to talk about each in detail.

First, on the list of clients: There are two references to the list of clients in Exhibit 3. First, it says, as shown in Exhibit B, attached, there are 143 clients, most of which have been clients continuously for more than ten years.

I submit that is a misleading statement as it stands. If it were an honest statement, it would have said, as shown in Exhibit B, attached, there are 143 clients, but it should be noted that of these clients, between two and

tionship, and that in fact --

THE COURT: I knew you were going to say this. That, of course, came out the other day, and, really, I am sorry that you raised this first, because, while this is a little puffing, are you willing to say here in all seriousness that this is a big deal and that Frankel or Kaufman or anybody that had half a mind would have been confused about this?

MR. POWERS: Your HOnor, I think --

THE COURT: Ben Robinson knew full well. He is in the business.

What is next?

MR. POWERS: Again, I am trying not to argue with the Court but to state my point as fully as I think it should be stated.

This business ran a substantial risk that if you had an argument with one union agent or one pension welfare manager or one president of the union, you could lose three or four clients at a clip.

THE COURT: Of course. If Ben Robinson didn't know that, I don't know who in this world would have known that. He is in this field, himself.

MR. POWERS: Then we tie it to the next element: what clients had been lost in 1968 and what clients were

Here is a company heavily involved in the construction industry, particularly in the New York area. They lost their biggest one, the carpenters, in 1968. Trouble was brewing in several of the other clients; manson tenders is under investigation; they may be losing that. You heard Ferarra testify as to a couple of other construction industry unions which were ultimately lost.

The foot was in the door on several of the New York construction industry unions to lose them at a later point, if they weren't already lost, and a disclosure obligation fell on Faggen because of this.

The next element is, he says, most of which have been clients continuously for ten years, but he doesn't tell about those who are clients for ten years or more that have already been lost, such as the carpenters.

THE COURT: Suppose I were to sell you my law practice. Would you expect me to sit down and write a memo and tell you about all the clients I have lost? This is kind of absurd.

MR. POWERS: I would respectfully differ with you.

THE COURT: If you asked me to delineate it, you would have a right to expect it, but normally when you sit down to sell a business, you don't tell about every customer

MR. POWERS: But you tell about the material ones.

THE COURT: Your own witnesses agreed, to a man, that they got a new client shortly after all of this, which, more than or at least equaled what they lost, and this is the kind of wicket which you push? I don't understand you.

MR. POWERS: The fact --

THE COURT: This can only be conceived in bias and animus, to make an argument like this. Let's get to your next point.

MR. POWERS: The fact that you lose one and make it up doesn't mean you have a growing business. It means you are standing still.

THE COURT: Honestly, Mr. Powers, you really defeat me. I don't understand how you can make such a ridiculous argument in the context of 10(b)(5). If that is the status of the law, nobody is going to buy anything, because businesses lose customers and professional men lose clients for all kinds of reasons that are unknown and unforeseen and probably have nothing to do with the merit of the firm or the corporation in their chosen line, and you push this wicket -- I don't understand it.

You set this up as a standard that no human being could ever live to.

Let's get to something else, please. I have heard

this for ten days.

MR. POWERS: If you will just bear with me for a couple of more sentences, I will move off this point, but I feel I have to put some things in the record and tell them to you, because I know you are treating each point with an open mind.

THE COURT: I am not treating with an open mind when you make ridiculous arguments and start with this. There is something better in the plaintiff's case than this.

MR. POWERS: When there is a particular kind of business, it has particular kinds of risks. A personal service business is based on personal relationships. It is like a law practice. If you have lost ten per cent of those personal relationships in the year you are selling it, you have a duty to tell the buyer about it. If you add to it that you have one man who is holding on to ten per cent of the remaining business, and he is a disgruntled employee, and he was passed over for a promotion, and you made him promises to tell him about whether you are going to sell the business or not --

THE COURT: You are talking yourself out of court on this kind of argument. That is just absurd. Disgruntled employees lurk everywhere. We can't get anywhere with that kind of thing. If that is a 10(b)(5) case, the courts are

going to be more glutted than they are, and businesses will grind to a halt. Nobody can insure against that kind of conduct.

MR. POWERS: You don't have to, but you can tell what you know of a fundamental nature about your business.

It is very common in SEC prospectuses when you describe a business to list your dependence on particular kinds of salesmen. You tell what your selling operation is. You tell how your clients break down --

THE COURT: You are talking about Talbot?

MR. POWERS: Yes.

THE COURT: He was a consultant. Everybody knows that. Please let's get to something else. You are just making this case from Titan's point of view weaker than you have to.

MR. POWERS: I am not here to bicker with the Court, but I am giving summation.

THE COURT: Look: I am not a lay jury. I have followed this case; I have worked on it, and please don't misunderstand me, Mr. Powers. I have understood this point beyond any doubt. It is one of the simplest points in the case, and, if I may say so, Titan has far better ammunition than this.

MR. POWERS: Let's talk about the computer capabil-

ity disclosures and non-disclosures.

First-off, it is clear when Mr. Faggen said we are in the process of programming completely automated pension plan calculations, he had no program at the time, and a fair statement would have been, "We are hoping to program a completely automated pension plan calculation, but none is in existence at the present, and we have one employee, who is employed at a modest salary, who may be capable of doing this, but no assurance can be given that we will ever program a completely automated pension plan calcuation for small and medium-sized employers."

THE COURT: You know, Willie Loman must be turning in his grave to listen to this kind of thing.

You have cut out all salesmanship or anything approaching salesmanship. 10(b)(5) isn't concerned with modest puffing. Take a look at that sentence on page 2. You have read it a hundred times, and so have I. Sure, from the witnesses we have heard, there was none in being. We know that. We didn't hear from Mosley, so there may be some doubt about it, but your witnesses were a little bit biased, for two reasons: they wanted to keep their jobs, or they didn't like Faggen, for good reasons to them, I am sure, but in any event, I will accept that.

If you are pushing this wicket, this is really thin

gruel, particularly since nobody pays the slightest bit of attention to this, really.

MR. POWERS. This language describing the computer capability is effectively tracked in the board minutes. It was the whole reason for the growth multiple, the ten times pre-tax earnings. The assumption this was a growth business, entitling it to the highest kind of earnings in the acquisition field in 1969 was wholly based on holding out computer capability with a firm earnings foundation beneath it, which had been growing steadily.

Mr. Faggen held out nothing real. This was like a prospectus that was sent out --

THE COURT: Don't tell me this memorandum is like a prospectus. That is just ridiculous is a term of art. Plaintiff's Exhibit 3, or the handwritten version, Mr. Faggen's handwritten version, which we called 2 or 2-A -- that is not a prospectus. You know it isn't.

MR. POWERS: On the fundamental items of the business, such as, do you know what you are doing in computers? Do you have the ability to expand --

THE COURT: Let's assume he over-egged the pudding a little bit. We know that the computer hardware was relatively unsophisticated. Even I know that from the evidence in the case, but, again, you make such a big deal about it,

and for a 10(b)(5) case I don't think you are very sensible.

MR. POWERS: I think it is more than the hardware. It is the human equation. Mr. Faggen didn't know the first thing about computers. He had one $16,000-a-year man. All he had was hopes and dreams, but he was a great talker.

THE COURT: What is wrong with that? Everybody in this case was a great talker. That is one of Titan's problems.

MR. POWERS: I think another element here is how Mr. Faggen misstated the truth about it, not only in Exhibit 3, but all the way through. He says under oath at the trial, "I told Tony Frank all about this," and he also says, "I told Kaufman we have nothing; we have nothing to sell; there is no computer capability."

Then why write it up this way? This is analogous to the first day of the trial. I told Kaufman not to pay attention to the Diebold memo. It is all Alice in Wonderland, and he is claiming the same thing here.

I wrote up something which I told him not to believe, which they could use for the records and presumably show to the board, and I took it to the chairman of the board to have it typed up that way, and I knew the board was going to know its contents --

THE COURT: Do you know what Burton S. Cooper is

going to say to this? He is going to say, sure. This was 1968; it was a booming market; Titan was hell bent to make acquisitions without too much concern as to precisely what the prospects were, and, as every witness in this case agreed on one thing, they disagreed an awful lot, and I don't believe most of them entirely, and I don't say that with any spirit of criticism -- this is inevitable -- but one thing they all agreed on, and I think accurately, and that is, first of all, this was Ben Robinson's deal. Do you remember that statement by several of our witnesses? First of all, think about what was going on in 1968. The sky was the limit.

Third of all, think about all that juicy cash and marketable securities in the Faggen bin.

Do you think for your moment your director witnesses ignored that? They did not. That is the kind of thing -- and I think Mr. Burton S. Cooper is also going to say that Tony Frank was so anxious to get this that he was panting, and he was no fool; he had the deal with his board; so he and Harold Faggen got together, and Faggen was asked to put this up in the best possible blush, so in case he needed it he would have a rosy memorandum to read to his board.

It turns out he didn't really need to read that at all. The board saw the point, but Robinson wanted the deal, and here is a company that had good cash and marketable

securities. It had been growing over the last four or five years, generally, and that was it.

You know what the defense is going to argue.

MR. POWERS: I have two answers to it. First-off, not even Mr. Faggen testified that he and Tony Frank got together to write out a bullish, puffing document so Tony would have it in his pocket.

THE COURT: In so many words, of course he didn't, and neither did Anthony Frank, but I don't believe everything that Harold Faggen said, and I don't believe everything that Anthony Frank said. I am not accusing them of being bald liars. Years have gone by. Emotions have been flaming high in this case for years. These things happen.

MR. POWERS: Let's go a step further. Your last comment was that the board saw money in the cash register.

THE COURT: Remember what each of your former board member witnesses said? Only one of them remembered anything about projections of earnings, and he was notably vague on the details of that.

MR. POWERS: I respectfully beg to differ.

THE COURT: I know you will differ with me, but I am pressing you to remember.

MR. POWERS: First-off, Tony Frank is on the board, Robinson is on the board, McIntyre is on the board, and you

have the same income restatement in McIntyre's possession, with McIntyre's penciled notes on it, as one of the exhibits.

Those are three directors. Hegy didn't go to the board meeting, but they solicited his comment. Gruenbaum remembers $500,000 -- "I remember the cash. We wouldn't have bought it just for the cash."

What is he saying? You don't give $5,000,000 in paper or cash equivalent to get a million dollars. You give that much paper to get a business. You don't buy a million dollars' worth of securities to sell them. You don't buy Faggen's investment expertise. You are buying a business.

What did Leonard Casey say? Leonard Casey didn't want the deal. He said, "We were in the real estate business, but the earnings looked good; it was better than 550 pre-tax, and it looked like a solid little company, so I voted for it."

I covered Gruenbaum, McIntyre, Hegy, Frank, Robinson, and we had another director here in court --

THE COURT: Let's not dilate.

MR. POWERS: Frager: what did he remember? "This was a great business, a million-one in gross receipts, 550 pre-tax in the ball park. I wish I could get into a business like that."

That was the basis for the reliance and the making of the deal, and the fact that they have a million-one, or,

take his numbers, a million-three in cash or cash equivalent, not necessary for the operation of the business, that is a plus, but that is not the reason you buy something for five and a half million dollars' worth of bonds.

THE COURT: Mr. Powers, I realize this is difficult for you as a member of the board of Titan, but let me ask you to remember what inferences can be drawn from another thing, and that is that every witness here who had anything to do with the management of Titan or was a board member all admitted one thing, thatthis is a company that among its many problems, paramount among many of those was a persistent situation of the cash shorts, and you can't realistically stand here and tell me that this wasn't a factor.

If you don't believe me, read the board minutes.

MR. POWERS: The presence of cash on a balance sheet, where you are giving five and a half million dollars worth of your own notes --

THE COURT: Paper, paper, mind you.

MR. POWERS: Would you give 3.2 million in cash equivalent to get a million dollars in excess net worth in an operating business?

THE COURT: I am not arguing. Of course you are right. They expected to get a business. Faggen had a good reputation with the chairman of the board, and his tax returns

showed it was a good little business, as Fragger said.

MR. POWERS: As Kaufman said and as Frank said, Faggen showed us a business that was doing, over a period of about four years, roughly, $500,000 pre-tax. This was the base. He said we could expand it. He said that this computer thing would result in a level year, one year out, then it would start to take off.

THE COURT: Right. I am glad you remembered that.

MR. POWERS: And we knew that we were buying something where we could expect, no matter what happened, we got ourselves 500 pre-tax and maybe 550 pre-tax while it expands.

You know, Exhibit A just didn't fly out of the air.

THE COURT: Exhibit A?

MR. POWERS: 8, the long projection in Faggen's handwriting. You know where I saw that first, for the first time?

THE COURT: Don't tell me. I am too young to hear it.

MR. POWERS: Robinson's deposition, we never even knew it existed. Here is Faggen laying out the program. It is going to grow fifteen per cent a year. The first year it will be level. In 1969 it will be 570 pre-tax. After that, this is the way it is going to go, and he even sold it by saying, "I am conservative," and not saying fifteen per cent,

but ten per cent, say, a year.

That kind of presentation is what motivated this corporation to pay ten times pre-tax in paper. There is no question that the paper was worth less than par value; it was worth less than five million five. But if it wasn't getting 571 pre-tax in 1968 and it wasn't getting a rough average of 500 for those four years, it wouldn't have given that in Chinese preferred stock or Hungarian pesos.

THE COURT: In 1972, 1973 and 1974 you make a good deal of sense, but in 1968, remember, the world was a little different.

MR. POWERS: I would like to make one other point. You mentioned once in chambers and once out here that it is hard for me to argue this because I am a director of Titan. I would like to lay that to rest.

I have been on Titan's board one year. I attend the board meetings, and most of the time I fight with all of the other directors, because I am very independent.

THE COURT: I am not blaming you for being a board member.

MR. POWERS: I have been on other boards of directors. I sit on other boards. I am an independent lawyer. I certify things to the SEC, and I have no difficulty in disagreeing with a client or telling him his position isn't

correct.

THE COURT: I have no quarrel with you on that. That is your prerogative. What I am trying to say is that you seem to argue this one point of view, which is perfectly fine, but I am warning you to anticipate what I consider are quite obviously arguments. I am trying to shortcut this, so we don't go all the way around the barn, and I don't want to have you think that I fail to understandyou, but I am a little troubled about this, and that is what I say, and the mystery in this case is how you ever made a motion for summary judgment and went up to the Court of Appeals. If I ever saw a case where summary judgment was entirely the wrong remedy, this is it, because different inferences can be drawn from all of this.

MR. POWERS: I don't have the slightest difficulty with the dialectic between us. I appreciate it. You are flagging issues for me. I sense an openmindedness on your part. Some of your questions are in the sense of a Devil's advocate, and you are trying to see what my answers will be.

THE COURT: Let's go back to something.

I can gather what you are saying is that the board really relied almost exclusively on what we have come to call Exhibit A to the complaint, or Plaintiff's 3, or the handwritten version -- it doesn't make any difference --and that

really was the fundamental inducement which was fraudulent.

MR. POWERS: I would like to expand on that. Now we are going to talk about earnings.

The failure to have $571,000 in pre-tax earnings in 1968, giving effect to honest and proper adjustments that we have tried to give effect to in this exhibit, Exhibit 10, is a very important element in our case. He comes up to a 41 per cent overstatement. His actual earnings in Exhibit 10, giving effect to most of his adjustments -- giving effect to all of his adjustments that were valid is $404,000 in 1968, and the difference between 404 and 571 --

THE COURT: Let me stop you there. You are relying on your post-litigation audit, and the testimony here of such gentlemen as --

MR. POWERS: Sosa, Williams --

THE COURT: Let me point out some problems with that. First-off, as everybody agreed, we used two markedly different theories of accounting. One is cash and the other is accrual.

Second of all, there was a considerable difference in approach as to the matters which had to do with proper accounting for a private firm as opposed to proper accounting principles for a public firm.

Third of all, you have the problem, which we have

to realize is in the background, at least arguendo, and that is that this is so colored by the fact that it was designed for this litigation that one wonders, so to summarize the two principal problems here as I see it that can be argued are, in effect you are asking this Court to compare apples and oranges, because of the quite different accounting principles applied, and, second of all, you are asking the Court to assume that the computations by these witnesses, who are then clearly under the thumb of Titan, for some reason are one hundred times more accurate than those contemporaneous by the Faggen people.

MR. POWERS: Let me go into that, if I may.

First-off, Mr. Faggen didn't present himself exclusively on a cash basis. If you take a look at Exhibit 1, which is the only set of written adjustments that exist, everything else was done orally. If you look at Exhibit 1, the so-called Diebold presentation, it is a combination of cash and accrual items. He bills up to his 571 by giving effect on an accrual basis to $25,000 in uncollected fees of an extraordinary nature; post-dating --

THE COURT: Let me stop you right there. That is the document which he says that Rogoff got up for him.

MR. POWERS: He said he wrote it up. Rogoff told him what to write.

THE COURT: I don't want to quibble with that. Let s say they did it together.

In any event, I see your point.

MR. POWERS: Let me go into a little more of an exposition on that.

THE COURT: This isn't going to hold much water. Suppose the Court finds that he told Mr. Frank.

MR. POWERS: First-off, you have a combination of cash and an accrual in the one document we have from them. Secondly, built right into the closing is a combination of cash and accrual. He did an accrual-basis balance sheet. That is what Joe Levine testified to. I had to get up a 1968 balance sheet, so I took a look at the level of receivables from the principal client, so the company was not just sold on a cash basis on any of the oral or written presentations. It was a combination, and, of course, a combination was the only thing that made any sense, because his basic sales pitch was, "If you took a picture of where I am right now, I have been doing much better than the books show," and that is, in effect, saying, "The books only show cash. Now I am going to show you how I am doing better by mixing cash with accrual concepts."

That was his whole sales pitch on this deal.

If you take the presentation in Exhibit E, and, your

Honor, I take responsibility for the pruning and the attempt to make -- Not Exhibit E; it is Exhibit 10.

I take responsibility for trying to make this as well balanced and as objective an evaluation of what was actually there, giving effect to his adjustments as we could do for purposes of an honest presentation to Judge Ryan and, two years later, of a similar presentation to you.

The first thing that we have here is that the accrual adjustments are really very slight. The accrual adjustments give him a $17,000 benefit in 1967. They are negative in 1968. It is only $5,500.

In 1966, they are bigger, but in the two latest years, the change from accrual to cash is de minimis.

Now, one of the reasons that it is actually in Faggen's favor is that he had a $59,000 vacation accrual that showed up at the closing, that nobody gave any effect as a charge against the adjustment that he had sold the deal on two months before, and he agreed to pick up $36,000 of it, but that $59,000 was the cost of doing business spread over those four years.

In this Exhibit 10, all he did was take $10,000 of it and spread it over four years to give it an accrual effect. It was treated on a most modest basis, and if, anything, it was overbalanced in his favor.

You take the other adjustments. He said add back the Federal, state and city taxes. He said he told this to McIntyre; he said he told this to Frank, and, of course, Exhibit 1 shows that this is how he was doing it with Diebold, so we added them in. We added in his accounting services income the same way.

On the investment income deduction, that item in itself, if you resolve the facts in the way I think they must be resolved, based upon the testimony before you, it is enough to find a material misstatement and an enforced liability against Faggen.

THE COURT: Remember that McIntyre, he and Russo checked into this and they were only interested after the discussions with management in making sure that the figures were in the ballpark, so to speak.

MR. POWERS: The 550 ballpark.

THE COURT: You put it 550 or 571. However, if you analyze what was going on here, most of the witnesses understood it in the neighborhood of $500,000, but let's not quibble about that.

MR. POWERS: There is an interesting point in McIntyre's deposition on that. I have given you the page in here. I will say it again if anybody wants to take issue with me. It is on page 69 and 70. McIntyre testified

"I spoke to Robinson and I remember at one point the deal was $5,750,000 in debentures, then it was cut to $5,500,000." That tends to bear out the reliance on the 571. This is the ten times pretax figure again.

THE COURT: Originally Robinson was talking about a figure from 5.5 to 7.5.

MR. POWERS: Faggen was. He wanted to be paid separately for his net worth.

THE COURT: He too, but Robinson said that seemed like a realistic starting point at the very least and heroic Kaufman negotiated Harold Faggen down and went home preening himself in the bargain.

These figures you say were the core of this deal.

MR. POWERS: Yes, sir.

THE COURT: But for that, nobody would have done anything, wouldn't have touched this deal.

MR. POWERS: If the figures had honestly been presented, there probably wouldn't have been an acquisition. 571 in 1968 and 500 for the three previous years -- the whole subtle point is, the scale of Faggen's operatim was grossly distorted and exaggerated. He was selling essentially a law practice and by exaggerating with a combination of accruals and telling how he was chizeling on his income tax and telling how he was doing this and that, he created a big

entity which wasn't a big entity. Rosen's testimony on this was essential. Until a business breaks through the million dollar tax bracket, you don't know if a business is going to survive. It takes a million pretax to get it on the American Stock Exchange. You have to have $500,000 after taxes. Back there in 1968, the listing requirement was 300 after taxes and the American was taking all the cats and dogs that you could imagine in those days. 500 is a kind of first step to see if you have a viable business entity.

THE COURT: Time is running on. You have been going almost an hour. I wouldn't go down to that legal detail about what happens on Amex, we are not there.

MR. POWERS: I have a few more and because of our dielectic, I have been going a little slower.

THE COURT: You are used to the fact we are not going to do this all day and I am just trying to gently bring you back.

MR. POWERS: I think the most fundamental misrepsentation here was the gross exaggeration of the scale and the rate of growth of the Faggen companies. This was essentially a small business. The average earnings as you could see in Exhibit 11 for the four years or around $3,015,000 pretax. He sold it as a business that was earning around 500 pretax over that four year period.

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THE COURT: I don't understand you. I just thought you agreed that your own witnesses established something in the neighborhood of $404,000.

MR. POWERS: That is for 1968 alone. I am expanding my presentation to the four years because that is just as important as what he did in the last year. It is the four year presentation which falsely sustained staying power and a steady rate of substantial growth over the four year period. The second occurred with a slight down turn was in the second year and in fact it was growing at a slow rate, this company. It was a small scale very risky business and if you put together the scale of the business with the undisclosed risk, on this loss of clients, this involvement with one particular disgrunted man, Tabor, with the lack of real computer capability, then the pieces of the jigsaw start to fall together because it was basically a small scale personal service business that he wanted to expand and he grossly distorted what he had to sell.

I think the whole multiple, 20 times after taxes or 10 times pretaxes should be considered in one fundamental element. For every 10 dollar lie, I get $100 worth of negotiable notes and maybe a hundred dollars in negotiable notes and the 100 dollars now because of the conditions in interest and so forth, they are certainly worth more than the ten

dollars I have lied about and for the $50,000 overstatement on investment income, which incidentally I think is about 12 to 14 percent on a $404,000 base, you get ten times that in bonds.

That is the really fraudulent element in this whole deal.

The final thing I want to talk about is credibility. I think that the pattern of these papers before you show Mr. Faggen misstating the truth repeatedly, both in Court, in deposition and in these papers, as well as in Exhibit 3 which is the basis of the case.

Let's look at some of these misstatements. The Diebold memo, when I gave it to Kaufman, don't pay attention to it, it has no meaning, it is just telephone numbers. If it is just telephone numbers, why did he make up Exhibit 8 which uses the same number? If there was just telephone numbers, how did he get to $571,000 in exhibit 3? If you take it a step further, he says in the beginning of his papers, we had this exhibit 3 at a preliminary stage of our negotiations. Suddenly exhibit 3 is done after the handshake. It is now done as a post negotiation step for the Board's approval.

You look at a statement --

THE COURT: Wait a minute. Frank agreed that he asked for that.

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MR. POWERS: The point, your Honor, is that Mr. Faggen at the beginning of this case said, why are they referring to this memo, exhibit 8 to the complaint.

Earlier in October at a preliminary stage in our discussions, I provided a summary description of the business. What was preliminary about that discussion?

THE COURT: Those affidavits are really absurd. They are a tour de force, I told you that. How in the world anybody ever thought summary judgment was going to occur in this case is one of the real mysteries but let's not get into that.

MR. POWERS: Let's take some of the other misleading statements.

When he gets on difficult grounds in his dealing with Ben Robinson, he states the union came to me and said, find us a lawyer. Zide said just the opposite. Who can your Honor believe? He said I don't have anything to do with moving a ten million dollar pension fund to the chase but Zide remembers it and Casey remembers it. Did they have any reason to lie about that?

Take a look what he said to Frank when the thing started to open up in the spring of 1971. Bob, don't worry about this. We have $230 odd thousand set aside as a liability and it isn't real. We are never going to have to pay it.

That is the same adjustment sales talk he was making to Kaufman two years before. Then he makes a statement, he had ten million dollars for this company from Diebold and in his own testimony here from Diebold, he said they were going to give me two and a half million dollars in cash and after that it was hopes and dreams. If they went public, they would give me some stock in the company. Maybe they would give me five million dollars worth, but all I really had was two and a half million, and this puffing and exaggeration to conceal what existed here is endemic to Mr. Faggen's character. It has been revealed to this court six, eight occasions in the course of this trial alone.

THE COURT: Eight occasions? What do you mean?

MR. POWERS: Do you want me to go through them?

THE COURT: You mean he has made eight misstatements of fact in his testimony?

MR. POWERS: At least.

THE COURT: I just wanted to know what you are referring to.

MR. POWERS: Anything as simple as the meeting with Tabor and the other employees. When Faggen testifies about selling the business, he says, no, if I told it to Levin Townsend I will tell you about it and I didn't undertake to sell it to anyone else.

That tells you quite a bit about his credibility.

THE COURT: I already told you, I don't believe everything that Faggen said and I don't believe all of what your witnesses said, either. In part I believe them, and in part I do not.

One of the problems of this case is, everybody dislikes everybody so much that that in itself has engendered some rather rash statements from the witness stand and in papers. Unfortunately or not as one views it, that is a garden variety type of thing in these matters.

MR. POWERS: In close, I would like to make one further point. You have heard 16 or 17 witnesses here including McIntyre, and in the case of practically every witness, they describe the facts one way. Faggen described them another one.

THE COURT: In part you are right but in part you are not right. That is a little bit all embracing. There were many points of agreement, for example, between Mr. Frank and Mr. Faggen. Many points of agreement between Mr. Frank, Mr. Faggen and Mr. Kaufman.

MR. POWERS: But on the key points, it is always Faggen's word against a lot of people who have no reason to lie. They are long gone from Titan, they are removed.

THE COURT: Mr. Powers --

MR. POWERS: Take Tony Frank --

THE COURT: Don't argue that. People have memory faults, and people also, particularly as time goes on, see things through distorted lenses. I know I do and I assume others do too. That is the real problem. I don't accuse any of these men who come on here to tell a pack of lies. That is the trouble. As I have been trying to suggest, there is the time lag, the quite clear self-interest of certain of the witnesses. This is inevitable, it happens in every kind of lawsuit and certainly it happened here.

MR. POWERS: I think the ultimate issue is --

THE COURT: Let me ask you this: Would you not agree with me that the word "projections" although perhaps not having quite the status of a term of art, comes quite close to it?

In other words, if you and I sat down to buy and sell, let's say I was going to sell you a business and you were going to buy it, I would say Lawrence my dear friend, my projections for, whatever they are, given the fact I am hoping we could put together a good accounting and data processing business, my projections are as follows:

Now, projections to you and me would not mean an absolute guarantee, would they?

MR. POWERS: No.

THE COURT: Isn't that one of the problems here?

MR. POWERS: I would like to answer that.

The projections were exhibit 8. Those were Faggen's projections. That document he gave to Robinson and which Frank remembered seeing, and Frank saw that document for the first time the day he came to testify here after 1968. I never had it in my possession to show it until the day he came to court for trial and I gave it to him. Have you ever seen this Mr. Frank and I remember getting that from Faggen around that time.

Those were the projections. Exhibit 3 is not projections. Exhibit 3 is a proforma statement of what we were earning. Exhibit 3 is analogous to what the SEC requires in a merger proxy statement or in registration where you are putting two companies together.

THE COURT: We are not doing that. That is one of our problems. This is not an SEC registration. This is not a classic 10 B5 where the plaintiff is a member of the great unwashed public that buys securities over a market. That is not this case at all.

MR. POWERS: Your Honor, the fundamentals as to what is full and fair disclosure, the bidder with the suite, are just as applicable in a private face to face transaction to buy a company as they are when somebody in the public buys

from a misleading prospectus and if I could go a step further with my exposition on this, I am not saying that you have the same standard of care in an acquisition to disclose every detail that you have in a prospectus. You don't. There are different people, different levels -- it is a different ball of wax under 10B5 in that sense and I wouldn't for the moment argue that every little detail that goes in that SEC prospectus -

THE COURT: All right, we understand each other.

MR. POWERS: What I am talking about here are fundamentals, that when you present somebody a reconstruction of what you have been doing for four years, that is what this is, it is not a projection, it is a story of the past and you present the past --

THE COURT: You are looking at the last page of Plaintiff's 3?

MR. POWERS: Yes. You present the past and A, you don't give anything in writing to support your adjustments but you tell them you are an accountant and a lawyer and you are holding yourself out as reliable and B, when you go to give some adjustments orally, when you are questioned on them, the only adjustments you give are for one year 1968 and they are kind of airy and vague but, again, you are an accountant, you are a lawyer, you are Ben Robinson's friend and you seem to be a truthful and knowledgable man, that is when you incur

the burdens of full disclosure.

THE COURT: One final question and it is only a detail.

You remember the gentleman from St. Louis, Al Frager. Am I right in understanding the record to indicate that he succeeded Kaufman as chief executive? In other words, he fell between Kaufman --

MR. POWERS: And Rosen for about 60 and 90 days.

THE COURT: Rosen?

MR. POWERS: Harry Rosen.

THE COURT: What is the chronology, Kaufman, Frager, Harry Rosen and Robert James Frankel?

MR. POWERS: Yes.

THE COURT: Let's take a short recess and Mr. Burton Cooper, I want to hear you and we have gone through a lot of detail and I want you to hit the point if you would. Let's take a few minutes to think about it.

MR. POWERS: May I put one more point on the record?

I haven't gone into Mr. Cooper's fundamental point that if this was also important to you why didn't you put it in the contract. It was in the contract, 3.23, the general catcall for any written certificates, reports or statements by the seller should not be misleading or contain omissions.

Secondly, I am suing for fraud in inducing the

contract in the fundamental business sales.

THE COURT: I understand your latter point and I the case law supports it.

(Recess.)

THE COURT: Mr. Cooper, to start with, I take it you don't dispute Lawrence Power's analysis of the jurisdictional problem? Neither of you raised it and I think you would agree, Mr. Cooper, that the case law indicates that there is ample ground for finding jurisdiction here.

MR. COOPER: Your Honor, there was only one piece of evidence on that and I think that was Rosen's evidence of mailing a copy of the agreement to Zide, because nodody testified to the use of mails or to telephones.

THE COURT: Kaufman said that he mailed the first draft.

MR. COOPER: To Rosen. That is internally. Ther was no communication between Kaufman and Zide.

THE COURT: I know, but isn't it reasonable to think that Faggen should have known or foreseen that there would be this use of interstate facilities in the mail and that there were probably intra state telephone calls as between Faggen and Kaufman just to set up meetings?

MR. COOPER: There may have been something -- I don't recall any testimony,your Honor, about any telephone

calls between Kaufman and Faggen to set up a meeting.

THE COURT: So you do dispute jurisdiction.

MR. COOPER: The only jurisdiction item that I think I do recall was Rosen's testimony that he did mail a copy of the agreement to Zide.

THE COURT: All right.

MR. COOPER: That is sufficient, I think, to bring it within the jurisdiction.

THE COURT: What about this time bar argument of yours?

MR. COOPER: Your Honor, I would like to suggest that I think the time bar argument is a very valid one. Notwithstanding counsel's argument on the non-waiver provision of the '34 Act A --

THE COURT: Forget that. The '34 Act doesn't include any limitation provision, therefore you can't waive something that isn't there to be waived, but he has a better argument than that. His argument really comes down to this: Look, it is true you look to the New York statute in your circumstances, but it isn't quite as simple as that first proposition. The real problem is, Plaintiff contends that they were lulled in effect and that it wasn't really until Frankel came in as chairman that they really looked into this and up to then because of the power of Ben Robinson and the fact that Faggen

was very much on the board and that there was this big turnover in top management, that would be wrong to rely on that contract provision.

MR. COOPER: Your Honor, I can't understand that lulling argument at all. It simply disregards the reality of the situation that existed when these companies purchased the Faggen companies. The Block group had taken over. They were not Robinson. That was Kaufman. They issued a proxy statement in May of 1969 in which they say it was truthful, that we did financially investigate, we analyzed the business earnings history of this company.

How can they come in to Court and say one thing in a courthouse and tell the public something else?

THE COURT: There is plenty of dirt to be smeared on everybody in this case, I will agree with you there. But, I think it is a little more than that. From a jurisdictional point of view, I would think it is a relatively low threshhold. In other words, the Federal courts don't favor these technical bars to getting at the merits and I think what Mr. Powers best argument is, look, perhaps the fact finder would have room to conclude that this was too little and too late, but for purposes of taking a technical view that this Court should not even consider the merits, and follow the contract, that is really a matter of federal law,

and that provision of the contract might not be favored by federal courts, particularly since it doesn't say anything about the possibility of saying, well, the parties shall have no more than so many months after they even discovered that there was a fraud, for example, or should have discovered a fraud, and that that provision doesn't say that, it is an absolutely cutoff, and I think that is where Lawrence Powers' argument is best.

MR. COOPER: What was the purpose of the estoppel on the notes in 1970? If they had done something to find out by April of 1970 whether there was any fraud committed in this transaction, they had at least a full year of internal accounting before they go their annual report.

THE COURT: I think this is very powerful, all the things you said going to the real merits or perhaps put differently, it is sort of a laches argument, perhaps, but I am really focusing on that contractual argument you make, to wit, the provision in the contract which says,-- the cutoff date was when?

MR. COOPER: March 31, 1970.

I can only say, Judge, it would seem to me that the contractual time bar that the parties regarded as reasonable at the time that they entered into this transaction, Mr.Kaufman had every draft of every agreement. He was a

specialist. He handled 300 before this one and he took over the chairmanship of this company in May of 1969 and he became a director in 1968. I don't see how they can now question the reasonableness of that time bar since it was a fully negotiated provision. This wasn't something where somebody was imposing that provision of someone's not equal economic power or strength. This was a negotiated contract. The parties agreed to it. What is unreasonable about it?

THE COURT: On its face it could be argued that it is unreasonable because it doesn't seem to take into account the possibility of a lulling or a concealment of a fraud in the inducement, for example.

MR. COOPER: It would mean that the courts would have to rewrite that as a matter of public policy.

THE COURT: I think the federal courts probably would have that right because though the federal courts have held that you look to the New York law, basically it seems to me the questions of whether or not there has been a waiver of this provision in the contract or as to whether or not the contract is reasonable, really comes back to a federal law question, perhaps, and I understand really that is what Lawrence Powers is best arguing. I think he would even agree with you, because I don't see you can waive something that isn't in the federal law to begin with, to wit, a specific

statute of limitations.

Anyway, your point is whether you take the view that I do that probably federal law is controlling, and you analyze carefully everything that went on both before and after March 31, 1970, that there wasn't any lulling in any event and as I tried to badger poor Lawrence Powers, you would argue look, this is a contrived situation because Frankel and Faggen didn't hit it off and Frankel was looking for some more cash and Faggen wouldn't cough it up and Faggen wouldn't do this and wouldn't do that, and then had the nerve to get seriously ill and was out of combat and besides, worst of all, we had to figure out some way to carry this awful burden of interest.

That is really your argument.

MR. COOPER: Yes, your Honor.

THE COURT: Don't say a word about this business on whether we are dealing with one hundred forty clients or whether we should cut them in half and don't say anything about conflict of interest because not even Lawrence Powers raised that and I think wisely and don't say anything about the first portion of Plaintiff's Exhibit 3 except this, and let me read it to you.

Do you remember Mr. Powers argued quite understandable I think at least from his point of view, page 2, the

second full paragraph on that page, and I quote;

"Since we have both actuarial and computer capacity, we are in the process of programming completely automated pension plan calculations for small and medium sized employers. We expect to provide the services to stockbrokers, accountants, and lawyers only."

Now, isn't Powers correct when he argues that this is a lot of balderdash? It is true, of course, they had both actuarial and computer capacity, but "we are in the process of programming..."

Part he said is complete balderdash. Isn't he completely right?

MR. COOPER: Not at all.

THE COURT: Why not?

MR. COOPER: In the first place, they were and in the second place, assuming that that language overstates to some degree the questions of process, what the process of programming means, it certainly is not a business in being, it is certainly not something which they had already previously undertaken.

You know, one of the things --

THE COURT: Wait a minute, I don't understand that.

MR. COOPER: The language specifically says --

THE COURT: "We are in the process..." In other

words, it didn't exist so nobody was misled by that.

MR. COOPER: That is correct, your Honor, and I tell you further; the facts that are conveniently overlooked in the other argument, you know I have the testimony of Mr. Frank on page 8, he testified to what the conversations were in dealing specifically. This is on direct examination, Mr. Frank testified what was the question, what was the substance of what Mr. Faggen told you about computer capability?

"A He had three basic points to make, I think. First of all he was already in the computer business per force because he needed them to do his business and in the course of his regular business, he had accumulated a data bank of several million persons, beneficiaries of the pension plans he did actual work for and it would take relatively little work to meet the demands of his union clients to employ the complete data processing serves for those non union clients such as dues collections, health administration I suppose and other aspects. In other words, it would take very little work to do that."

Then he goes on to say, "Those were two of the three points. The third point was that Mr. Faggen had a concept which I grew very excited about of computerizing the capability of analyzing relatively small corporate pension funds and using

that capability with almost no face to face contact between the client and the actuary which is the key to keeping the cost down as a sales device for say other CPA's or brokerage firms."

Now, obviously Frank knew what Faggen had been telling him. This was a concept of how they were going to go out and undertake to go into this business. They were in the process of trying to get into it.

If you look at the part of Mr. Kaufman's affidavit, one of the exhibits is, I believe, his notes of the first meeting with Mr. Faggen. He talks about Faggen having a 360/20 computer. He didn't say anything more about it.

THE COURT: Say no more.

The next thing is the loss of clientele in 1968 and the argument that Faggen should have anticipated that this much abused consultant Taylor, that somehow or other this was a gross violation of the law, both common law fraud and 10B5 not to anticipate and say Taylor is going to run out of the door sometime tomorrow with some very important clients.

MR. COOPER: How do I answer that argument?

THE COURT: Yes.

MR.COOPER: Let me answer it first a little indirectly and say if there was ever a lulling argument to be made here, Mr. Tabor's departure should have alerted anybody

who wanted to claim fraud at that time to have done it and that was in December of 1968.

Let's go back to what he should have anticipated.

Mr. Tabor's departure. I don't know how any businessman without a restrictive covenant contract, and even then I am not sure, could hold a disgruntled or unhappy or if somebody offered him a better deal type of thing to an employee.

What was it that these parties were looking at? They weren't looking at Faggen's business from the standpoint of him telling him look, I assure that every consultant that I have today I will have tomorrow. He couldn't have possibly said that to them anyhow, but one thing he did disclose to them was that he had no restrictive covenants with his employees. This came out.

Once they knew about it, what was the misleading element? I just don't understand that argument at all.

THE COURT: Incidentally, Faggen brought this to the attention of Titan management and they commenced suit I guess against Tabor and his new employer.

MR. COOPER: Levin Townsend.

THE COURT: How much did they realize on that settlement?

MR. COOPER: $262,000.

THE COURT: That is why probably nobody was lulled.

MR. COOPER: If they were going to question the fact that a consultant could leave and bring on such a crisis, whether or not that constitutes a question in Kaufman's mind who was chairman of the board when this went on, are we being -- shouldwe look into this thing?

THE COURT: All right, I got you.

Now, really I think what it comes down to, addressing ourselves to Mr. Powers' arguments, I think he can deny this if he will, but the way he organized his argument, or closing argument, quite clearly as I can see, he really saved the figures to last and he makes the point, which I think is a good one, you have to distinguish between projections on the one hand and the proforma page which is part of Plaintiff's Exhibit 3, and as you know, that the argument goes, this Court should accept the testimony of Rohn and Sosa and Williams and all the rest who in this 1972 spring and onward reconstructed all these figures and they show in 1968 something in excess of $400,000 as pretax income as opposed to what plaintiff claims was brooded about in this proforma and here it is in front of me, $571,000 for 1968.

How does Harold Faggen answer that?

MR. COOPER: Two ways, Judge, and I think your Honor I was going to open my argument with this. I had no intention of dealing with those other issues.

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THE COURT: I forced you and Mr.Powers into that. You have to blame that on me, I understand.

MR. COOPER: Judge, I find this whole trial to have been a most -- to say it kindly, a bizarre experience.

THE COURT: I am sure Mr. Powers would join in with you on that and so would I. Forgive me for my laughter.

MR. COOPER: I wanted you to, because I have been amused, I really have, I shouldn't say amused as well as bemused, to construct and contrive a case out of such thin parchment amazes me.

If you take a look at the adjustments that were testified to by Mr. Faggen, nobody denies that those adjustments were part of this transaction. They come up to 571. The only thing that you might ask about is investment income, which in 1968 was $50,000, which if you deducted from 571 brings you down to 520.

THE COURT: Remember, in Plaintiff's 3, the proformas, as Mr. Powers reminds me and I think properly so, this really was, has written in hand there, it includes investment income.

MR. COOPER: Judge, that Harold Faggen had written in?

THE COURT: Excuse me, excludes.

MR. COOPER: Harold Faggen wrote it. The handwritten memorandum and the words "excludes investment income"

was not on it. That is in Tony Frank's handwriting, "excludes investment income."

THE COURT: Right.

MR. COOPER: Let's analyze the "excludes the investment income" argument. Shall I finish my point?

THE COURT: Yes.

MR. COOPER: I will get back to the "excludes investment income" argument in a moment.

THE COURT: Right.

MR. COOPER: Certainly I think we have to agree that McIntyre did question and did respond and Frank did need an answer to what constituted the adjustments. You will recall his testimony, he was afraid of Peat Marwick. I cross-examined him and asked him, you certainly weren't going to buy a business for five and a half million without finding out what constituted these adjustments and he agreed and I said that is why you assigned McIntyre and he agreed and McIntyre has testified, pension overfunding was an item. City and state taxes was an item. Salary adjustments were items. T & E were an item and personal accounting fees were items. Everyone of those items were fully accounted for to McIntyre and he comes up with the only one that he couldn't read off the tax return, was T & E, because he didn't know what the amount of adjustment would be, but pension over-

funding is right on the tax return. City and state taxes are right on the tax return. The salary adjustments were part of the contracts. The personal accounting fees are right on exhibit 3. The only ones that there could have been a question about was how much of T & E would Titan have disallowed from 1965 on.

THE COURT: I understand all that, but where does that lead you to?

MR. COOPER: It leads me to this: There is nothing untrue in that statement. If that statement is not untrue, where is the claimed fraud?

THE COURT: Then how do you account for the dichotomy created by Rohn and Williams and all the rest after this litigation was commenced?

MR. COOPER: Very simply, in two ways. In the first place, what do they do with this exhibit? The first thing they do is knock out pension overfunding. The second thing they do is knock out investment income. There is a hundred thousand that they just knocked out.

THE COURT: You say when Tony Frank wrote the phrase on this exhibit A page to Plaintiff's exhibit 3, he was erroneous in that?

MR. COOPER: Absolutely, and I will point out one insignificant reason why. Kaufman testified when he first

spoke to Faggen, Faggen was looking for a deal which involved the purchase of his business plus net worth and he said it would have been irrational to have paid for investment income if you were paying for the man's net worth.

Do you remember that testimony?

When they made the deal, however, they did not pay separately for net worth. Ergo, if you are not paying separately for net worth, why do you knock out both ways?

THE COURT: That is the argument I was telescoping by quite a different phraseology trying to get Mr. Powers to respond. All right, I get you.

MR. COOPER: What I am saying to your Honor is this: What happened here; to contrive a lawsuit by saying Exhibit 1, which is the Diebold, in some magic way was transferred in Mr. Faggen's mind into Exhibit 3 without any relation to truth and to come into the Court and attempt to persuade your Honor that this is the way this whole thing came about, what responsibilities did Kaufman have when he came to Faggen on October 2 to find out what Exhibit 1 meant?

Here is the specialist. He testified he doesn't recall even discussing adjustments.

Your Honor, I submit to you that we are not buying a grocery store on a corner when we are in here. Kaufman is a well recognized specialist and he comes into this court-

house and takes the stand and testifies and I don't recall sitting down with Mr. Faggen.

THE COURT: You can go further than that. I meant to flag it for Mr. Powers but I will flag it for you.

Do you remember on cross-examination of Kaufman that he said in substance, I really didn't have that much responsibility for the details of this deal?

MR. COOPER: Absolutely. I was getting to that too, Judge.

THE COURT: That, of course, could have cut for the plaintiff or against.

MR. COOPER: But what Mr. Frank said, Frank said, in answer to Mr. Powers' question, what did you regard Mr. Kaufman's responsibilities, after the Robinson firm? Kaufman was in charge of strategy. Robinson's firm was in charge of drawing the papers.

How could he possibly say he had no responsibility? Why did he get a red line draft of this contract if he had no responsibility? If after he sent in this piece of paper which was the first draft, mind you, knowing in that first draft about any representations about this proforma, and throughout the contract negotiations, constantly getting redrafts, not a word out of him about it, and one of the things, your Honor -- I bit my lip when I heard it -- when

he said that 32.23 encompassed this proforma, that is the representation and warranty, the all embracing one. Let's leave aside for a moment that the Taussig-Leasco decision with which your Honor is familiar where the language is identical, identical with the language of this contract. I have it here, I could read it but I don't want to burden you with it. Take my word for it. The language of that clause is identical with the clause in this contract.

THE COURT: You mean my Taussig versus Leasco case?

MR. COOPER: Yes.

THE COURT: I recall it very vividly. I don't get your point, though.

MR. COOPER: In the Court of Appeals decision on your case, they were analyzing whether the language of a clause which was the same -- it is at page 784, 473 Fed. 2nd and it is Judge Timbers opinion and he is reading from paragraph 10 of the conditions precedent of Taussig, then the language reads:

"All of the obligations of Taussig under this agreement are subject to the following conditions:

"A, representations and warranties true at closing. The representations and warranties of Leasco contained in this agreement or in any certificate or document delivered

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pursuant to the provisions hereof are in connection with the transactions contemplated hereby," and I will stop at that point because the rest of it goes on.

What does 3.23 of our contract say? "There were representations or warranties by the seller in this agreement nor any document, statement, certificate or schedule furnished to Titan pursuant hereto, or in connection with the transactions contemplated hereby contains or will contain any untrue statement of any material fact necessary to make the statement of facts contained therein not misleading."

Almost identical language. What does the Court of Appeals say about such language?

"We interpret certificate or document delivered pursuant to the provisions hereof or in connection with the transactions contemplated hereby to refer to those instruments and be delivered at or prior to the closing, as required by the four corners of the agreement."

Now, there was absolutely nothing in that proforma that was within the four corners of the agreement which the parties to these agreements intended, and for Mr. Kaufman to say what he said, indicated to me, because it was absolutely new, it was thrown into the case at that point, I had labored under the impression that Kaufman had come into this case and this entire case was being constructed on a fraud in the

inducement case. Now we are being told no, you are now being accused of a breach of contract or a breach of a warranty under your contract.

THE COURT: I think Mr. Powers was reasonably clear on that this morning. He is pressing fraud in the inducement. Isn't that so?

MR. POWERS: Absolutely.

MR. COOPER: I agree, I think he still is, but he was using both sides of that point.

THE COURT: I don't know about that. I have to say the facts of this case are nowheres near the facts of the Taussig versus Lesco case. But you are right, the contract language is very similar.

MR. COOPER: And the court held it had to come within the four corners -- I didn't want to dilate on that because I am prepared to argue to the question of whether there was a fraud in the inducement.

Kaufman in this case -- I started to go off on the question.

THE COURT: Let's hear you on it.

MR. COOPER: First of all, Judge, I can't understand how there can be fraud on the inducement in this case when every objective piece of evidence would indicate there was nothing -- first of all, I take the position there was nothing

untrue which of course knocks out any fraud on the inducement in the proforma, but let's assume arguendo that there was some misrepresentation in that document, I don't know where, but let's assume there was. I think I demonstrated to you before how the "excludes investment income" --

THE COURT: I passed that. Let's follow through. You say even assuming there is some misrepresentation, what is your conclusion?

MR. COOPER: In this document. Where is the materiality, where is the reliance, where is the scienter?

THE COURT: Now, your point I assume is the one that I badgered Mr. Powers on. You say that really they never relied on this proforma at all?

MR. COOPER: Absolutely not, Judge.

THE COURT: Except possibly, don't you think, Kaufman may have used it as a rough guide, as he put it, negotiating Faggen down --

MR. COOPER: You are talking about Exhibit 1.

THE COURT: No.

MR. COOPER: Kaufman never saw this.

THE COURT: We have to talk about Exhibit 1.

MR. COOPER: He starts off by saying I had Exhibit 1, and the circumstances as a reasonable man, I can't understand this kind of an argument but okay. They meet on

September 6. They never met before. Kaufman asks Faggen what kind of a business do you have. Faggen tells him. He writes up a series of notes of the meeting. He tells him what he has by way of offers from other people. Not a word that he recalls about discussing how do you get to these figures, what do these items constitute, not a word.

The next meeting comes on October 2. He sees tax returns, he knows what this business is about by now. He comes down to Faggen's place. I remember a case from my law school days dealing with domestic relations. I take it they didn't play a game when they came down there, they must have been doing something.

What Kaufman said merely looking at Faggen was I don't want to pay you seven and a half million, I only want to pay you five and a half million. What kind of business were they buying?

THE COURT: I don't think Titan argues that they didn't know what business they were buying.

MR. COOPER: If you take the position that Kaufman was operating solely from Exhibit 1 and never discussed adjustments and never looked at anything but a tax return, then all we have is that Kaufman came down to the Faggen premises on October 2 without going into any element of Faggen's business besides Exhibit 1 and a tax return and says I am

going to pay you five and a half million.

THE COURT: Let's take that. Isn't that very likely if that is all that he did and that he used Exhibit 1 to come up with a multiple, and that that is all he was concerned about, isn't it a good argument for you to say that?

MR. COOPER: I am perfectly happy to say that. How material can this be? How much reliance could he have placed on it, all this very sophisticated investor and very sophisticated negotiator looked at with the numbers in the tax returns, calculated in his head what that meant and came up with a number. If that is true, what materiality did the subsequent preparation of that proforma have to the business deal which Kaufman and he entered into.

THE COURT: I think it has significance. Plaintiff argues this thing really in two bites. Plaintiff argues that Kaufman was misled, partly by Exhibit 1, party by what Faggen said orally.

Second of all, and in any event, and you correct me if I am wrong Lawrence Powers, beyond that is what happened on October 6 and then the following day on October 7 when Faggen as requested by Frank came up with the handwritten version of what we now know as Plaintiff's Exhibit 3 and following that, two days later on October 9, there was really fraud in the inducement all the way along through the use of

several documents and several oral statements and several large silences and in simplistic terms am I putting it about right?

MR. POWERS: Absolutely. If I can correct your dating, the second meeting with Kaufman was October 2 and it was not until October 7 that Exhibit 3 was written.

THE COURT: I agree, that is the chronology.

They wanted to have it all the way along, and if they could prove it, I suppose arguendo, --

MR. COOPER: There is only one thing wrong with that picture. There is no nexus between one step and the next.

THE COURT: You are saying even if you take this, by the time we get to Kaufman at least, he already made up his mind and fixed a figure of 5.5?

MR. COOPER: Right. He made up his mind, he represented the Block group. He had five and a half million in mind.

THE COURT: And perhaps today, or rather at our trial when Kaufman appeared here, maybe from your point of view at least, the reason why he made that unusual statement that he really didn't have much responsibility was to help out good old Titan so they could have the other end of the spectrum too in case his view of the matter was found wanting;

that is your argument?

MR. COOPER: Yes.

You take that another step. What was the significance of the Board of Approval subject to executive committee approval of this transaction? And the specific minutes say, this is approved in principal subject to executive committee.

Two months have elapsed.

THE COURT: Russo and McIntyre are committeed to look into it and also the Robinson firm.

MR. COOPER: What was Kaufman doing in all of this? He never showed Exhibit 1 to anyone. He was sitting there, he never showed Exhibit 1 to anybody. He never told anybody about it.

THE COURT: All right, I get you on Kaufman.

Let's stick to Plaintiff's Exhibit 3. What is your argument on that? Mr. Powers says really what happened was, Frank went in, he passed copies of this thing around and everybody poured over it and they looked at the proforma and said--

MR. COOPER: But it wasn't the testimony. Nobody got it.

THE COURT: Hegy my old artillery field classmate said he got it.

MR. COOPER: He said he got it, never asked a question about it.

THE COURT: I understand. Hegy at least saw it but he wasn't there to vote.

MR. COOPER: He wasn't there to vote and the thing never got passed around. Frager said he never got it, Frunebaum said he never got it.

THE COURT: Let me remind you of something here. Alfred Frager, the St. Louis boy.

MR. COOPER: Specifically testified he didn't get it.

THE COURT: You are right. He said Frank had a piece of paper and he quoted 1968 operation figures and for figures for five or four years preceding. He stressed the opportunity to acquire an actuarial company which billed in excess of $1,000,000 with profits of 50 percent and a growth potential of roughly 15 percent for the year following, and then, of course, also, which I tried to push Mr. Powers on, Frank pointed to the assets including marketable securities of 1.1 megabucks worth.

From that you could draw the inference that there was some stress by Frank and corresponding reliance on the so-called proforma in Plaintiff's 3, even though apparently so that Frank had never saw it as such.

MR. COOPER: He never saw it, nobody else got it and let's assume for a moment that they had all gotten it.

What was the significance of broadening the executive committee with approving this transaction? They didn't say that that was the final word. All they said was, find out if this is right.

Judge, I really don't think I can expand any more on what I have regarded as totally unreasonable demands being placed upon this defendant by this plaintiff as to what that document should or might have meant back in 1968.

THE COURT: Let me say I understand you on that but there is one thing I really don't understand and I think perhaps understandably we have all sort of overlooked it even though it has certainly been on your mind and I assume that of Mr. Powers.

Harold Faggen has a counterclaim here. He is seeking what relief in that counterclaim?

MR. COOPER: The notes have been accelerated.

THE COURT: He is claiming under the terms of the notes, that he is entitled to the face amount of those notes plus back interest?

MR. COOPER: Yes.

THE COURT: And I assume, or at least it has been tacitly the position of both sides, that if Plaintiff looses here on its claims, the counterclaim almost inevitably follows through as day into night.

MR. COOPER: Yes.

THE COURT: Let me go back to the merits of Titan's claim here. Your view on reliance you pretty much articulated, and one of the things that I pressed Mr. Powers on as you know was, supposing you were to argue, the defendant was to argue, let's assume in some way this proforma came specifically and directly to the attention of the board, and let's assume Kaufman relied on it in some way, and let's assume also that Kaufman and Frank at least thought it was very important to their views in the matter; that this was all tale stuff because of this business of Ben Robinson being thoroughly acquainted with Harold Faggen and in his dominant position of chairman pushing this deal, and that there was no reliance there for the reason that everybody trusted and liked Ben Robinson and were pretty much agreed to accept his view of the matter.

MR. COOPER: How would I respond to that?

THE COURT: Is that one of your arguments?

MR. COOPER: Is that one of my arguments?

THE COURT: Yes. You say that reliance has not been shown.

MR. COOPER: Absolutely not.

THE COURT: And I want to know whether that is one of your arguments on the kind of thing that Mr. Powers says.

MR. COOPER: It is an element in it but it isn't the controlling element. Every director said look, we were looking for cash. This 1.3 million was something we were looking for. Grunebaum said that, Casey recognized that, Frager recognized that, Frank recognized that and Kaufman recognized that. Everyone of them recognized that.

THE COURT: So did Robert James Frankel, really.

MR. COOPER: He recognized it in a very unusual way, Judge.

THE COURT: But he it seems to me was more or less willing to concede, if anybody pushed him on it -- let me ask you this. There has been debate you know, not serious, but throughout our trial there has been some difference of opinion as between Titan and Faggen. You have always argued as I understand it, if you tolled up the cash and the marketable securities at a market price as of the time of the events in the fall of 1968, let's say roughly, came to 2.3 megabucks, or a million dollars, I should say for the record, whereas I gather from Mr. Powers and Mr. Frank and their witnesses, they claim at the very most this came to no more than 2 million flat.

MR. COOPER: Judge, the only area that I can see of disagreement is, the $175,000 of treasury notes, which I will concede for the purpose of this argument at least may

have been not credited to Titan but may have been left in Faggen's division, because Mr. Levine testified -- he only testified as to 50. Fifty of the treasury notes stayed in the division, but I don't even want to quibble on that. I am prepared to say right now, because I don't have the records to support it, both records are Titan's records, $175,000 less off of 2.3 million or roughly 2,175,000.

THE COURT: I don't think it is an important detail from either side because both sides generally agree that there was at least two million in liquid assets in the Faggen companies.

MR. COOPER: I will tell you something else if I may conclude and I just wanted to pull a few points together now. I think I have analyzed what I regard as the question of what did this proforma mean and what did it say and I am sure you have gotten my point, that I don't see any proof in here that there was anything untruthful about it, but let me just show you what I regard as important in the way this lawsuit developed and how a contrived lawsuit gets put into a court and we spend these many days trying with these many witnesses.

If you look at the complaint filed in May of 1972 and look at the proof in this case now and look at the arguments that have been advanced and ask yourselves as a

lawyer, what are we trying here, how did we get to this point?

They accuse us of having received $42,440 in cash at closing. Only $40 changed hands.

They tell us that there was one million two in net assets. Even on Kaufman's minimal figures, there was one million five and that showed up in a release never sent to the public after the proposed acquisition that there was a million five in assets. Kaufman in 1968 had not left them a million five and they came in with a complaint of assets of one million two.

They talk about broad reliance on a proforma. They knew the board hadn't relied on it. All they had to do was ask Frank.

THE COURT: Let's be fair about it. One of the reasons I told Mr.Powers in his argument that I wasn't totally persuaded that any of these witnesses, the major witnesses, were really telling the complete accurate story, and I didn't mean by that to condemn any one of them in the ad hominem sense but this gets kind of fuzzed of the lapse of time and the high bitterness.

MR. COOPER: Judge, I have tried enough cases to know that when you get to analyzing evidence, the most important thing to do is to try to see where are the agreements located

rather than where do the disagreements come in.

THE COURT: That is a very important part of it. What is the point?

MR. COOPER: What did this complaint deal with? This complaint said we represented net income pretax. That document is misleading. The document never said net income pretax.

THE COURT: This is one of the reasons that I marveled why your office and Mr. Powers' office ever thought that you would get anywhere with a motion for summary judgment in this case. I can understand how Faggen wanting to get his hands on the interest, but if anyone thought this case would be decided on summary judgment than to go up to the Court of Appeals and bother them, I marveled. These things happen in the practice of the law.

I don't think you need to say anything further. Let's take a short recess.

MR. POWERS: Are you going to give me five or ten minutes to hit in rebuttal?

THE COURT: You take a recess.

(Recess.)

MR. COOPER: Your Honor, could I conclude with one sentence?

THE COURT: Yes.

MR. COOPER: I just wanted to point out to your Honor, the proof in this case was, we got 3.2 million for this in terms of the present value of this transaction and that the plaintiff in this case in its own annual statements has valued these companies at five and a half million up to the present day and that there has been no amendments or anything else and the testimony of Mr. Rohn on that score is absolutely incredible, and they have sustained no damage. Aside from everything else.

THE COURT: Of course as we all agreed, we were trying the issues of liability here only. You may be right and I realize that one of your defenses in effect is, you want to know there was no proof of possible damages in any event

What do you want to say, Mr. Powers?

MR. POWERS: First off, on what Mr. Faggen should have said about Tabor. I am not contending that under 10B5 Faggen had to say Tabor may leave me any day or predict that Tabor was going to leave. All he had to say was, I have one key consultant who handles about ten percent of my business and I have had continuing problems with him over the past four years. All you have to do is flag the point for the potential buyer, you don't have to tell him how it is going to come out.

There was lulling when Tabor left. Kaufman said

I asked Harold Faggen who was this Tabor, who are these clients he took and Faggen says look, we are better off without these clients, we never really made any money on them they are not very profitable, it is just as well, we will do better in court.

There is a lulling element there when you combine it with the fact that Kaufman and for years thereafter, no one knew in Titan that 10 percent of the business had been lost in 1968 already.

When you put Tabor together with the 10 percent you don't know about, the carpenters and the other small unions, then you have a 20 percent short fall and when you have a successful lawsuit conducted by Robinson's office to get some money in right away from Tabor and you don't know about the loss of the preceding 10 percent and Faggen is smoothing it over by saying it is not profitable, you don't pick up the point.

On that issue of the statute of limitations, there is another principal that applies here that I have overlooked mentioning to your Honor.

In Katz versus Amos Treat, the second circuit said, even on the one year statute of limitations assuming on the failure to comply with section 12 or section 5 of the '33 Act A, even in that kind of a case, we have a tolling of the

statute for the period that the person didn't discover the wrongdoing, and you would have a tolling concept built into this contract if we were suing on the contract but of course we are not suing on the contract, we are suing on the common law statute of limitations which has been incorporated by reference into the federal law of rule 10B5 and 17A and if you take their three year statute of limitations argument, we are well within it because the first time you have a full year of operations with a report from Faggen is in the springtime of 1970. This action was brought in the springtime of 1972, well within the three years they are contending.

THE COURT: But that is not quite their argument. You understand and I don't think you have to belabor that.

MR. POWERS: Okay. This investment income point, this is the one element of the case where you have a document retrack. Look at Exhibit 3B in Mr. McIntyre's handwriting, and the third page of it is, a document which is the same page we are suing on in Exhibit 3. When we look at that document, here is what we have. We already have Tony Frank testifying, "I asked Harold and I wrote 'without investment income' on it." The one you are looking at has Ben Robinson's handwriting on it so he has written in "without investment income."

At the foot of the page you have some penciled

notations which means it was in Russo's hands and then if you look at the exhibit which is M-3 to the McIntyre deposition, you see McIntyre writing something in penil on the bottom of the same document himself.

Here is two accounting personnel, one of whom is also a director with the "excludes investment income" concept in their hands. There is Ben Robinson with it in his hand and his handwriting and here is Tony Frank with it and here is Kaufman saying, why would I pay for investment income twice if it was cut out of the deal and I wasn't paying for his investment security separately, why would I let him bring it back in at 10 times multiple?

The other point, he keeps saying that pension over-funding has been misstated in Exhibit 10. The misstatement is his. He took one year, 1968 and he said I put in $64,000, I didn't have to, therefore added it to income and multiplied by ten.

He didn't give any figures for the three preceding years. It is clear there was pension cost to conduct this business and it was a cost in the $22.5, $30,000 zone. It continued before, it has continued ever since and this was just an artificial adjustment item and it was one of the most fundamental misleading oral statements made in the deal and it wasn't any different in Exhibit 1, the thing that went

to Kaufman, because he handled the phoney thing the same way for Kaufman.

THE COURT: Thank you.

You made one point that I want to get Mr. Cooper's reply to.

MR. POWERS: I had a couple more.

THE COURT: Mr. Powers, I understand you. We can't go on forever in this case. You said just a few minutes and you have gone ten. What else is it you want to add? I will never get around to deciding the case the way you go on.

MR. POWERS: Faggen said in his testimony and Mr. Cooper said the opposite, that he went over all the adjustments with Kaufman and Frank, that he presented them piece by piece.

THE COURT: All right, that is just detail. You are just going down to the point of cutting gnats eyebrows off with a tweezer but you have made one point which is important.

Take a look if you will at 3B which as Mr. Powers just said is in evidence and you remember it does have Robinson's -- Robinson was a little vague but he did come around to admitting this was his handwriting, and then at the bottom of each year, there are figures in writing. And most importantly, just as an illustration, somebody 536 under $571,000.

MR. COOPER: That, your Honor is a subtraction of the personal accounting fees. If you take out the personal accounting fees from 571 you get 536.

MR. POWERS: Russo testified on that point.

MR. COOPER: "Without investment income" in Robinson's handwriting, Robinson testified that was a question. It wasn't a statement.

MR. POWERS: I disagree with that construction.

THE COURT: I know you do. I just want to give him a chance. You made the point. It is an important argument. Why can't you let him answer it?

MR. COOPER: Did your Honor want me to respond?

THE COURT: I thought you were interrupted.

MR. COOPER: I was.

With respect to the documents itself, I don't know the purpose of Mr. Powers drawing your attention to it.

THE COURT: I think what he wants to say is, number one, he wants to argue that everybody was understood because Harold Faggen made him understand that these figures on the proforma excluded investment income.

MR. COOPER: Except that Mr. McIntyre when asked specifically about that document on page 43 had testified, "Have you ever seen the third page of M-3 before?" and He said, "Yes.

"Q Where did you see it?

"A I have seen it as exhibits and various documents relating to this case and I know I saw it sometime.

"Q Late 1968?

"A Yes, or early 1969.

"Q All right. Now can you fix a date for when you saw it," and he goes on to something else.

THE COURT: That is besides the point. What I am trying to get at, I thought you were going to point out that he saw this and understood this included investment income.

MR. COOPER: He testified in his deposition and in his affidavit, your Honor.

THE COURT: You have the page in his deposition?

MR. COOPER: I will get it for you in one second.

THE COURT: That is my memory he did so say.

MR. POWERS: I didn't want to interrupt. He said it in his affidavit and he didn't say it in his deposition. He said when he gave his affidavit he didn't have this document before him and this was an oral recollection and now that he sees the document, he thinks he remembered seeing one without it on, but he was unsure.

THE COURT: I understand that, but that is not the point I am making.

MR. COOPER: Page 8, your Honor, he says what he

discussed. There is nothing else discussed. He doesn't refer to investment income but I do know he specifically stated that investment income was included.

MR. POWERS: I of course disagree but you have the whole deposition before you.

THE COURT: Obviously I have the whole deposition, but I am just trying to get some help but I guess that is too much to ask given our track record in this kind of an argument.

Take a look at page 18. Well, Mr. Powers didn't ask that for perfectly good and sufficient reasons I can understand.

I think it appears in the so-called cross-examination of Mr. McIntyre.

I will have to look for it over the luncheon recess, I guess.

MR. POWERS: If I could summarize my recollection of it.

THE COURT: No. If I were going to rely on anybody's recollection, I think it is better that I rely on mine.

Second of all, I am not looking for either yours or my recollection. I am looking for what the transcript shows, and as I say, that is too much to ask and I will check for it over the luncheon recess and perhaps you and Mr. Cooper

will do so too.

We will adjourn until 2:10.

(Luncheon recess.)

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THE COURT: First of all, gentlemen, let me apologize, I got interrupted unexpectedly by another matter hence my delay of about eight minutes.

With regard to just one thing before I go ahead and dictate my findings and conclusions in this case; in looking through Plaintiff's 27, it comes out a little different than either one of you argued, although I suppose in a sense it supports the defendant more than it does the plaintiff.

Mr. Powers, you asked McIntyre a number of times whether or not he recalled seeing the exhibit which we know is the pro forma attached to Plaintiff's 3, so on and so on and he said yes, he had seen that but that he didn't remember that he worked with the copy which had written on it in somebody's hand, "exclusive of investment income."

He also stated when he made his affidavit he was not working with this particular document. That is the best I can make out of it. Would you agree, yes?

MR. COOPER: Yes, your Honor, I would agree. I would also say in his affidavit he had said that no one had brought to his attention that investment income was to be excluded and then when the questions were asked on the deposition, the thrust of them was not to ask him

whether they were included or excluded, but whether he had seen the document and the page at which he says that --

THE COURT: I have it. It is 25 and 26 which is a good illustration although it appears elsewhere.

MR. POWERS: Your Honor, I agree with your statement on that. I hope you are able to read between 17 and 32 at lunch. I think you have to go up to 32 to get the full flavor.

THE COURT: I have read the whole thing before this. It is just that I was trying to pin that down.

MR. POWERS: We have also established on the exhibit itself, Ben Robinson wrote it in because it was his handwriting on the document and he testified to that.

There was a supporting point on that ...

THE COURT: You have had all morning. The time has come. I am under the time gun. This case was transferred to me with every assurance from everybody that it ought to be tried and we have been trying it as best we can and let's not argue any more.

MR. POWERS: Could I make one point, I think it's important enough to take your time and I will make it briefly.

THE COURT: I wish you would.

MR. POWERS: Investment income was extraordinary

income. It was unusual, it had to be disclosed by Faggen. His faulire to affirmatively state without investment income is an omission under 10b-5 because in the preceding document, he plainly excluded it and if he was giving them a new document with the same 571,000, he had the duty to identify, he now had decided to add it back in.

Even if you were to resolve the factual controversies against my position and I am not saying you will, there was an affirmative duty on Faggen's part to disclose this separate category of non-operating income which is 12-1/2 percent of his 1968 earnings and my position on the other omissions were the same. The lost clients, nine were lost in '68 --

THE COURT: We covered that ad nauseam.

MR. POWERS: Thank you for your patience. I am through.

THE COURT: Gentlemen, as you know after this case was reassigned to me, and just after the middle of January, 1974 from Judge Ryan, we finally were able to get both sides on for trial in this bench trial which took place on February 19, 20, 21, 22, March 5, 6, 7, 13, 14 and 19, 1974.

Both sides have amply argued the matter and submitted papers, most particularly in the form of

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proposed findings and conclusions with citations therein and I believe it is to the interest of everybody involved, counsel, litigants and perhaps even the Court if this case is resolved at the trial level.

* * * *

[Findings of Fact and Conclusions of Law--pages 1140 to 1176--are printed herein at pages 6a to 43a.

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THE COURT: Mr. Cooper, as the winning party, is there anything I misstated or left out?

MR. COOPER: Not that I am aware of, your Honor. The only small note, you asked us -- you saw no evidence about the executive committee. In the contract documents, there is an executive committee certificate.

THE COURT: Yes, I remember that but what I was talking about and complaining mildly about, there was no detailed evidence as to exactly what that committee, qua committee considered and did. You are right, the certificate is there and that was accepted by everybody and it has always interested me and still puzzles me mildly and I assume what happened, Mc Intyre and Russo reported something to somebody on the executive committee and they considered that and then they considered what Mr. Rosen and others in the Robinson firm had negotiated out with your office and they said it looks hunky-dory and the executive committee said "fine," so to speak and issued their certificate.

I had sort of anticipated when the trial started before me that either Mr. Powers or you would bring to bear some evidence. I am not criticizing this.

MR. COOPER: Otherwise. I have nothing that I can add or bring to your attention to correct.

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There may be some date periods in there that your Honor may have misstated.

THE COURT: That is what I was seeking. If you see anything like that, let me know. I will check it over myself, but in case you or Mr. Powers see any misstatement of an obvious nature, I will be grateful to you to inform my chambers.

MR. COOPER: Yes.

MR. POWERS: Your Honor made the statement that there was $2.3 million in cash in the Paggen Companies on the acquisition date.

THE COURT: I said from $2 to $2.3 cash and marketable securities.

MR. POWERS: Your Honor, it wasn't even close to that. On Mr. Paggen's presentation which is M-2, there was found in the McIntyre files and also part of Exhibit 1, Mr. Paggen says his net worth is $1,881,601 giving effect to $43,000 worth of sculpture and giving effect to pre-paid salaries of $66,000 and a couple of other adjustment items.

THE COURT: That is not the point, Mr. Powers. I understand you and there are other documents which are even lower, but basically at the time the inference from everybody's discussions was, given the marketable securities at then market value and the cash, it would come between

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$2.0 and $2.3 million. You have admitted this to me informally.

MR. POWERS: No, sir. If I could correct this for the record and I --- I am really trying to help the Court find a fact correctly. Taggen said about $1.8 net worth. McIntyre's memo before you in 3B says $1.6 net worth. There was $1.2 million extra net worth not used in the business. There was aboutfour or $500,000 used in the business and that is the whole package.

THE COURT: In terms of net worth, I think you are right, but I am talking about this -- perhaps I put it wrongly when I said net worth. Liquid assets and cash.

MR. POWERS: Was only $1.2 at the most. $1.1 in securities which is agreed and --

THE COURT: All right. If Mr. Cooper agrees to that, I will stand corrected.

MR. POWERS: The reason I think your Honor got off on that, in Exhibit 12 we tried to show you the total cash flow-through over the whole period and it was $2 million total over the four or five years of the relationship, then a net---

THE COURT: You are quite right. I stand corrected.

Do you agree to that?

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MR. COOPER: Your Honor was right in one sense earlier. When the presentation was made as to cash and securities, I believe there was $1.3 in the securities and then there was $200,000 additional in cash and $100,000 in certificates of deposit and $300,000 overfunding which may or may not have been included in that figure.

THE COURT: We come to either $1.8 or $1.6 as Mr. Lawrence Powers states, so I stand corrected.

MR. POWERS: The other thing I would like to point out to your Honor, mostly to protect my record on this rather than to give thought to a change of mind, we don't have to establish reliance. Affiliated Ute so holds.

THE COURT: That was a case on quite different facts. I have already conceded that the law is somewhat ambiguous, but I claim that Affiliated Ute is so far removed factually from this that the holding therein has nothing to do with this case at all.

MR. POWERS: I would further like to bring to your Honor's attention, you made a comment that the only director besides Robinson, McIntyre and Frank who got Exhibit 3 was Hegy, but he wasn't at the board meeting. Well, Robinson, McIntyre, Robinson Frank and Hegy were four directors. Casey testified to $500,000 pre-tax

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figure --

THE COURT: I didn't deny that the figure was bruted about, but I say nobody could care less about that. That was a lot of talk.

MR. POWERS: I thought your Honor's statement when I wrote it down that Frager was the only one that recalled earnings.

THE COURT: The only person other than the persons who you say, Frank and McIntyre and Robinson --

I am not even sure about Robinson and Frank. They are so vague on this.

MR. POWERS: It was typed up in Robinson's office.

THE COURT: I agree with you but that doesn't mean it was in his hands at the directors' meeting. You make so many assumptions on the basis of your understanding. I agree with you Frank had it. He was there, he presented it. I found that, no doubt about it. I have no doubt as Frager said that somebody mentioned $500,000 earnings or maybe $550,000 or maybe even $571.

MR. POWERS: Frager said $550.

THE COURT: I accept that. I quoted it this morning and this afternoon. I am telling you that my finding is, they didn't really care about this. They weren't interested in this at all. This was only an afterthought.

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Frank may have been interested in having it available in case any arguments came up but he is not the entire board.

MR. POWERS: The other thing I would like to bring to your Honor's attention, you made a statement that there was a prospectus distributed by Titan in which it said it negotiated at arm's length with Harold Faggen and cleared with the SEC. I think your Honor misspoke. There was an annual report of Titan describing the Faggen acquisition. There was a proxy statement --

THE COURT: Proxy statement, you are right.

MR. POWERS: My point on that is, this shows that they didn't know they had been defrauded because they were saying "asfar as we know, we made a good deal."

THE COURT: Mr. Powers, I give you credit. You never say die. You are right first of all, I misspoke. I should have said proxy statement, and the annual report which I did say and not prospectus, I so stand corrected, but that wasn't the point at all I was trying to make and I have already ruled against you so let's not go into that.

MR. POWERS: My final observation is, you made a comment that the actuarial business stayed strong and I think continued to grow and I think the testimony was that it shrank, or at best stood still.

THE COURT: No, I was talking about the year 1969

rksf 7

when things were going pretty good asfar as anybody could see for awhile, particularly that the actuarial business stayed strong. I didn't say about after 1969 or if I did, I stand corrected. As a matter of fact, later everything went. The market went into a decline and I specifically find and you well know this, that the stock, instead of 70-1/2 drifted down, down, down in 1970 right up to today, it is selling for what, 50¢ a share?

MR. POWERS: Between that and a dollar.

THE COURT: We all know of the market decline that started in the beginning of 1970 and continued to 1971 and it was a business decline but I meant to be referring only to the early going after the market in 1969. I thought I made that clear but let me make it clear to you now. There came a time where the actuarial business didn't do quite as well as it was doing or expected to do.

MR. POWERS: Finally, you know I disagree with you on your contruction.

THE COURT: That is one thing I am crystal clear of.

MR. POWERS: This Taussig versus Wellington case --

THE COURT: It is Taussig versus United States Lease Company. Forget about it.

rksf 8

MR. POWERS: When the parties enter into a contract, even if you don't find a violation of the fraud rules on the part of one, if they went into that contract on the assumption of basic values and, the Court could on proper application reform the contract to fully reflect what the parties intended by it.

You have some testimony before you that what Mr. Faggen intended to get --

THE COURT: Mr. Powers, I have decided the case, for better or for worse. I don't know what you are doing.

MR. POWERS: I am trying to reserve a point to brief to you.

THE COURT: I don't want any briefs. I was told that you wanted this case tried. I got it at a time after it was supposed to be tried by a direction of the Court of Appeals. I have done my best. I am the first to admit to you that I may be way off base, but I have done my best, this is it, let's not think up anymore arguments.

MR. POWERS: Could I state something on the record to protect my record on this?

THE COURT: I don't know why you are protecting your record, I am not interested in that. I have decided the case, exception to you. I don't understand what you are trying to do.

rksf 9

MR. POWERS: I am trying to state in the record that I believe that with all the testimony that Mr. Faggen was looking for was $3,000,000 in cash, that it was an abuse of equity to grant a judgment of $6,000,000 to him in the circumstances and I would like an opportunity to brief that issue to the Court, that this is a ripe case for contract reformation --

THE COURT: Now you spring this on me. I never heard of it before.

MR. POWERS: I thought of it at lunch.

THE COURT: I am late for another proceeding. You are indefatigable. If you want to make a motion to reargue or reopen, the rules deal with that now.

MR. POWERS: If I can do that by motion, I appreciate it.

MR. COOPER: In connection with the judgment on the counter-claim, under the notes, just to bring to your Honor's attention, there was a default on the interest payment of May 1972 for $110,000.

THE COURT: Right.

MR. COOPER: Plus $5,500,000 on the notes at 7 percent from May '72 to date within the terms of the notes and in addition, the notes provide for reasonable attorneys' fees.

rksf 10

THE COURT: You submit a judgment as you see fit and Mr. Powers can consider submitting a counter-judgment and that will be that, but I don't want to argue those details now.

MR. COOPER: I was just wondering what your Honor wanted to do with the fixing of reasonable attorneys' fees.

THE COURT: I don't want to argue that one now because I am not prepared to and nobody told me I was going to be fixing attorneys' fees. You are both lawyers and you decide whatever it is you want this Court to do and I will consider it but not on this record because nobody has bruited about attorneys' fees.

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mbcg 1

TITAN GROUP, INC.,

v. 72 Civ. 1797

HAROLD FAGGEN,

April 8, 1974
Room - 128

THE COURT: I guess the laboring lays in your court first, Mr. Powers, because originally this all started with your notice of motion requesting a hearing on the issue of amount of damages, which you filed, according to your clerk's office stamp, on March 6 of this year.

We also have pending, as you know, a judgment which Mr. Faggen's counsel ostensibly either prepared or got the clerk's office in the regular course to prepare after trial, which judgment calls for attorney's fees in the amount of $250,000.

We also have, of course, Mr. Cooper's letters in connection with the judgment and memorandum in opposition to Titan's motion to have some sort of hearing.

I have read your papers, so don't fail to forget that, but I would like to hear you briefly on what you think this court should do.

MR. POWERS: I think this court should set down a

mbcg 2

hearing on the issue of damages. Incidentally, I have never seen --

THE COURT: Are you talking about legal fees? Are you talking about other damages? What are you talking about?

MR. POWERS: Both, your Honor, on the amount of the counterclaim that can be entered as damages in the case and the amount of legal fees that can be entered.

THE COURT: Well, on legal fees I perhaps understand, but on the other I don't.

MR. POWERS: All right. To start with -- incidentally, I haven't seen this proposed judgment. It was never served on me.

THE COURT: Well, it's simple enough.

MR. POWERS: Your Honor, Mr. Faggen doesn't even have five and a half million dollars in notes, if that is what he is seeking a judgment on. He has three million in notes. The Franklin National Bank has million and his first wife has a million and a half.

THE COURT: I know, but that is not your problem, that is Faggen's problem.

MR. POWERS: I think part of proving a counterclaim as a holder of notes is to come in to court with the notes. He has only got three million, but I'd like to get to

mbcg 3

the more fundamental issues than that, your Honor. We can get to the other thing later.

The fundamental issue is I don't think you can enforce a matter of law and a federation clause in this context, for two reasons:

First, Section 29 of the 1934 act says any contract made in violation of this statute is void, and further any arrangement to waive any rights under this statute, and the courts say, directly or indirectly, is void and unenforceable.

In the context here --

THE COURT: But I don't understand you because nobody has held that this contract is in violation of Section 29.

MR. POWERS: But, your Honor, the right to come to the Federal Court to seek to determine whether or not the contract is enforceable is something that both the Supreme Court --

THE COURT: Forget the Supreme Court. No one quarrels with that, or at least this court doesn'tquarrel with the right of Titan to bring this suit.

MR. POWERS: Yes, sir.

THE COURT: I won't do anything but add on my own motion that Titan's -- I can't say even having listened to all the evidence that Titan's claims were patently frivolous

mbcg 4

on their face. They weren't. We had a trial, remember, and the trial had to be decided. They want something to be said, as there usually is, on both sides.

MR. POWERS: And unless it's decided --

THE COURT: No, no, please, Mr. Powers, listen to me carefully. It might help you for a change. Instead of ignoring everything I am trying to tell you, listen particularly when it's in your favor.

But the trouble is we had a trial. The contract is not voided. Also, as you know, Mr. Cooper makes the point that you could have avoided all this problem if, instead of unilaterally deciding not to pay interest, that you could have paid the interest and the protest pending the results in the suit; but no, you didn't think about it and somebody didn't think about that, and that is a fairly forceful argument as a practical matter, isn't it?

MR. POWERS: I think there are two answers to that point, your Honor. First, Mr. Cooper moved to compel the payments of interest, and the court held that we weren't required to pay interest because of the overall balance of equities between the parties. There is a principle --

THE COURT: Of course, the court held that, but that was in an entirely different context. The court wasn't saying that you might not be running a risk on your own part

mbcg 5

or on the part of Titan.

MR. POWERS: Well, I think the principle here is that Mr. Faggen, even on the balance back in '72, owed us more money at that point than we owned him on unpaid interest. The interest payment --

THE COURT: What did he owe you?

MR. POWERS: He owed us for siphoning off some three or four hundred thousand dollars worth of business from the company.

THE COURT: We have put that behind us. We had a trial on all of that.

MR. POWERS: No,we didn't have a trial on that issue because that goes to the issue of damages. On the date that thissuit was brought, we owed him $110,000. On that same date he owed us a great deal more than $110,000.

THE COURT: This court didn't agree with that. You didn't prove any such thing.

MR.POWERS: Your Honor, I am not talking about the claim of fraud in the inducement of the contract. I am talking about plain set off in denial and in abatement of his claim to five and a half million, and the only cash claim he had when we came to court was for the interest. Our cash claims against him were larger than $110,000. We didn't pay. In fact --

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THE COURT: But you never offered any evidence to that effect.

MR. POWERS: Because your Honor agreed to separate the damage issue from the liability issue.

THE COURT: But you have to make some showing that there is liability for the damages before you can make such an argument as you are now making.

MR. POWERS: Sir, I respectfully disagree. I am assuming that you have made a decision that we have live with this contract, but we are still entitled to show any abatement of the price we owe under the contract by way of set off for independent wrongs done to us by Mr. Faggen.

THE COURT: I am telling you you didn't prove any independent wrongs.

MR. POWERS: It's because we didn't get to the issue.

THE COURT: I am sorry. You rested. I asked you if you had any more to prove, and you said no, sir.

MR. POWERS: Your Honor, when I finished with Mr. Castrovinci, I said, "Your Honor, I reserve the right to recall Mr. Castrovinci on the issue of the management issue on the diverting clients claim" and you said, "Yes, Mr. Powers, I understand that is your position, but I want to know if you are through with Mr. Castrovinci now on this issue, the liability issue."

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THE COURT: That's right, the liability issue, and I don't recall any evidence to the end that Faggen diverted any monies belonging to the corporation.

MR. POWERS: I didn't begin to put the case on because it was a separate issue.

THE COURT: You tell me that now, but it's a little late, it seems to me.

MR. POWERS: Your Honor,at the conclusion of the trial I want to put on our diverting of business and mismanagement proof. In my proposed findings of fact, I make it clear that that is a separate issue. Your Honor agreed yesterday leave everything to do with damages separate.

THE COURT: Wait a minute, Mr. Powers. As usual you are blinding me by your razzle-dazzle words, but this isn't what I understood at all. I understood that we were bifurcating in the traditional way proof of liability and the proof of damages, if damages were what Titan was entitled to. I don't recall any evidence showing that Titan was entitled to recover any damages.

MR. POWERS: Your Honor, my reason for not putting on the evidence is because I was led to believe we were having a separate hearing on the damages, and it was inappropriate to put on that evidence in the liability issue.

THE COURT: As far as you go you are absolutely

mbcg 8

right, but you are saying one thing is one thing and I am now saying another thing is another thing, because I never understood, and I still don't understand your playing on words. We had this trouble throughout the trial. You never listened to me then, and you don't seem to want to listen to me now.

I understood that we would prove liability. Liability to me means to prove that a party is liable to another for something. I heard no evidence which persuaded me by a preponderance of the evidence that Titan was entitled to recover anything against Faggen, and I so ruled.

MR. POWERS: Sir, that wasn't the case I was proving at that point. Then they had a counterclaim --

THE COURT: Well, I never agreed to bifurcate the case any further than damages of liability.

MR. POWERS: Even under normal order of proof, it was their duty, as to land lost on liability for fraud, to come forward with the notes in hand and prove their right to recover.

They didn't come forward with any notes in hand, so I didn't put on my defense of set offs against full payment on the notes that they had in hand by reason of damages we suffered.

I traversed the damage issue that they were making claim on. We took depositions on it. It was an understood

mbcg 9

issue all during the case.

THE COURT: Well, it wasn't as far as I was concerned, and I doubt that it was on the part of anybody else except you, and it only came to you since the decision in this case. That is what I think, but be that as it may --

MR. POWERS: All right.

THE COURT: I repeat, the notes are in evidence.

MR. POWERS: They are not, your Honor. He doesn't have five and a half million in notes to put in evidence.

THE COURT: They are in the hands of others, as we all know, and the record in the Court of Appeals shows this. The stipulation embraced the record in the Court of Appeals which shows, as you say, technically that the notes or some of the notes are in the hands of the bank and perhaps his former wife as holders in due course. That I agree.

But that doesn't give any excuse to you to have this after the fact sought.

MR. POWERS: Your Honor, I state to you on my oath as an officer of this court that I prepared a proof of Mr. Castrovinci and Ferrara and have my outlines of that proof on the damage issue from the first day of this case and was awaiting putting on that proof until you permitted it.

THE COURT: Mr. Powers, that sounds great except for one thing. It is already clear that there are many things

mbcg 10

that you have on your mind which do not accord with my view of what is going on. That is number one.

But more importantly than that, I repeat for the last time, there was no evidence from anybody to the effect that Faggen might be liable for diverting funds from the coffers of Titan.

It was your duty, as I see it, to go forward and show something to the effect that he might be liable . You didn't.

MR. POWERS: Your Honor, I have an argument to make today, and I have a couple of other points to meet, and I don't want to bicker with you unnecessarily, but I stated this to you even in chambers. At one point you said to me --

THE COURT: I am sorry, Mr. Powers, that is a little bit overreaching. You said a lot of things to me in chambers which I wish you had never said, but that is of no application whatsoever.

MR. POWERS: Well, your Honor, my proposed findings of fact and conclusions of law separately leave the damage issue open, and we are very clear on it.

THE COURT: Mr. Powers, there is no point in discussing it. I agree with you on that statement, but before I get to proof of damages you have to show entitlement to damages or liability. For the last time I repeat, you have

mbcg 11

shown none.

MR. POWERS: But the order of proof is for them to show our liability on the notes, and we put on our proof of the damages to rebutt it.

THE COURT: Because the notes are in the record of the Court of Appeals, which is a stipulated document in evidence in this case, the notes on their face are sufficiently explanatory as far as they go, and of course that is all they do.

MR. POWERS: Well, if the court feels in your opinion that there are three million dollars in notes in evidence, because that is all Mr. Faggen has, at this point I have the right to go forward and put on proof showing we don't owe the three million doolars, and I have two strings to my proof on this.

First, we don't owe the three million dollars or any other amount in excess of three million because this clause in operation, the acceleration clause, is prohibited by the 1934 Act and also as a common law --

THE COURT: I told you I didn't agree with that.

MR. POWERS: Let me turn to the next reason which you might agree with, your Honor.

It operates under penalty and is unenforceable, and because it is unenforceable, the most your Honor could give

mbcg 12

in damages under these facts is either specific performance or the fair market value at the time and place of the promised performance, that is, on the date of breach of the notes that Faggen has in his possession.

THE COURT: Are you relying on that Leasco case for that?

MR. POWERS: Yes, sir, no, sir.

THE COURT: I hope not.

MR. POWERS: Your reasoning in the Leasco case was what set me to thinking on normal contract principles of damages and their application here.

I relied on that Nicholson case in the 8th Circuit which, incidentally, is not just one case but cites the law in a whole number of states. That is Northcom Theater Corporation against J. J. Nicholson, and if the acceleration clause, by binding together in one price principal and interest is enforced, it would give the return on investment before the risk on the investment has been carried out, an equity amount enforcement acceleration clause in that case.

There is another case in the Supreme Court of Massachusetts that says the same thing that I have defined since then.

The Nicholson case is based on a number of authorities throughout the nation, and it's very carefully reasoned.

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It's based on the same Supreme Court case that I have cited to you.

THE COURT: Wait. You are rushing on.

MR. POWERS: Excuse me. I am on pages 3, 4, and 5 of my reply and supplemental affidavit in support of motion for hearing on damages, which you said you had had a chance to look at

If I could give an exposition of my point on this, I might be able to shorten it for the court.

THE COURT: I am sorry, I just haven't looked at Nicholson here.

MR. POWERS: What I am basically saying, your Honor, is that Mr. Faggen made an investment in Titan. His witness said he made a 3.2 million investment in Titan, and he took back a block of investment securities. Incidentally, these are investment securities under the U.C.C. They are not notes.

The terms of that investment were that if Mr. Faggen held them for ten years and there was an appreciation in the value of Titan's stock, he could get a great deal more money than the 3.2 million he invested, but at the end of ten years, no matter what happened, he would get his 5.5 million in cash, which was a combination of the 3.2 million initially invested and a return on investment incorporated in the contract.

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This wasn't just a one-way street for Titan. Mr. Faggen couldn't have gotten, if the stock had gone up and we had the forfeit on these notes, Mr. Faggen could have gotten 8, 9, 10 million dollars on these notes, because the conversation operation would have made them so much more valuable than just the par; but basically he bought them way below par from Titan. He bought them from 59 cents or 59 that you usually have, using the price that you usually have for bonds. I am contending that two years later they happened to fall in value because the conversion option isn't worth very much, and interest rates going up, and they are worth 40 or 45 now instead of 59.

But that is his only remedy in damages. To give him $100 in damages is to give him a liquidated damage, a penalty which is unenforceable in this context.

These cases are right on the button. They are extremely strong. The Nicholson case is cited with approval by the State Supreme Court of Massachusetts with more cases underlying it, and it's just hard rulings in equity as to what you can do here.

No one is trying to take anything away from your ruling on liability. You can give specific performance to damages --

THE COURT: You know, you go on and on and on.

mbcg 15

First of all, you had a claim for damages, right?

MR. POWERS: Right.

THE COURT: As you say, you were entitled to bring that claim, no matter what the notes provided for, acceleration or no. I agree with that.

What is all this business of equity in a court of law? You won or lost in a court of law. Of course I realize before I ever saw you, you were trying to invoke equity by injunctions or preliminary injunctions, but that is all behind us. We had a trial. You sued this Faggen for damages. I claim, and I still claim you didn't prove by a preponderance of the evidence any entitlement of Titan to damages vis-a-vis Faggen. There is no equity involved. That is a law point.

MR. POWERS: The acceleration clause is as unenforceable as law as it is at equity, and these cases created as an obstacle to enforcement both at equity and law.

In addition, Mr. Faggen is seeking specific performance of these contracts. He is not seeking damages, and he is the one who is seeking the equitable remedy, and he is stuck with the equitable defense.

THE COURT: All right, I suppose in a rough sense at least you are right, but I don't see any reason in the Nicholson case. I don't think that has anything to do with our situation.

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MR. POWERS: Let me go into this a little further. We both know that Faggen didn't invest $5,500,000 as a lender to Titan. Faggen exchanged some securities for some other securities. The value represented by the securities by his own expert was no more than three million two.

Afortiori, the paper he got, and his expert testified to that, was worth no more than three million two on the day he got it.

THE COURT: Not a very impressive argument if from his point of view he would say that so far it hasn't been worth what is expert said with all the aggravations he's had to go through.

MR. POWERS: Now he's come into court and he is entitled to two remedies under the law of contract damages. He is entitled either to specific performance or he is entitled to value of the promised performance at the time and place of breach.

The reason he isn't entitled to enforce the acceleration clause now --

THE COURT: You mean to say those notes are meaningless? Is that what you are really arguing, that the notes are meaningless?

MR. POWERS: Not at all. That the acceleration clause in the context in this kind of a dispute is unenforce-

mbcg 17

able. It's a penalty clause.

THE COURT: But you could have avoided this so easily if you would have paid the interest under protest subject to the results of this suit. You wouldn't have had this problem, but no --

MR. POWERS: But sir, the law doesn't require us to pay more on a bad deal. For one thing, the '34 Act says --

THE COURT: You made a deal saying you would pay interest and you didn't.

MR. POWERS: Your Honor,we sued to set aside the contract.

THE COURT: You are entitled to do that, but don't come in after you have lost the suit and say that you are entitled to have other relief.

MR. POWERS: But at the time we sued to set aside in good faith we believed he owed us more money that we could conceivably owe him on the $10,000 interest in stock.

THE COURT: But you haven't proved that.

MR. POWERS: But let's jump over that point so I won't bicker with you on something that I don't have to bicker with you on.

Right now, where do we stand? Mr. Faggen agreed to make a 10-year investment in Titan. If the stock underlying these investments securities would have gone up from the

mbcg 18

$16 it was when he bought it in to 25, an 8. rise, these notes wouldn't be worth five and a half million. They'd be worth 9 million.

If we defaulted at that point, do you think we could get off the hook by giving them five and a half million dollars? Faggen could come to court and say these notes are worth 150 because they are convertible bonds and I want my 150, you can't take it away from me.

By the same token, if he is getting out three years after he went into the deal, and he is not leaving the 3.2 million he put in at risk to give 2.3 million on top of it, and get the 5 and a half million is to give him a penalty. It's a windfall, and the law of contracts doesn't permit it, whether it's law or equity, and these cases on three, four and five of my supplementary brief are absolutely fundamental. It's Supreme Court decisions. It's a principle of compensation.

Mr. Faggen didn't bargin to get five million five on May 1, 1971. The principal didn't even come due then. The principal isn't due yet. It's due this coming fall.

He bargained to get a big up side on the stock, and a down side guarantee at the end of ten years, or he'd have five and a half million, and the law doesn't permit him to take his risk money off the table in this context. He can

mbcg 19

stay with it. You can enforce specific performance here, or if he elects to have damages, you can give him damages on the traditional doctrines, but he can't have it both ways.

What he is trying to get in his judgment, he is better off as a result of breach than he'd be by performance. He gets himself five and a half million dollars. He finds a borrower as risky as Titan where he can get 15, 17 percent on his money, and at the end of 10 years, instead of five and a half million, he's got 12 million dollars. Is that fair? Is that what the law of contract damages is designed to do?

THE COURT: All right. Now let me stop you right there. If I understand you correctly, what you are saying is all this court should do now is reinstate the status quo subject to your paying back all the interest you owe, and he's got the convertible debentures.

MR. POWERS: Right, or alternatively, if the determination is these parties shouldn't be kept waiting, the law of contract damages provides the remedy.

The idea is give the man the fair marekt value of what he's got, and the fact that that is less than 3.2 million is not a terrible result or reason. The idea of fair market value is if these notes are only worth two and a half million, which I think is the real value right now, if he's got that in cash, he can go out and find a borrower of equal risk to

mbcg 20

Titan, some other source for investment, and make his five and a half million in the next five years, and that is the idea of giving him compensation in contract damages.

THE COURT: I was with you until you loped off again, as you do so frequently.

MR. POWERS: The recognition he would get would be contract damages, which is the value of the promised performance at the time and place of breach. Now, as I would see it, it would be as folbws:

First, he would be entitled to the $110,000 that was on May 1. He would then be entitled to interest from May 1 through the present at legal interest, which is 7 percent. That comes to, I believe, close to $500,000, those two pieces together.

In addition, we would put on testimony and you would have to decide what the fair market value of the subordinated Titan investment securities as of May 1, 1972, the time and place of breach, and you would give him that as his principal value back.

He might put on proof that shows it was worth $4,000,000 then. My proof, my offer of proof is that they were worth 40 to 50 percent at par. When he bought them he paid 59 percent at par. The reason they fell in value is because long-term interest rates went up so dramatically, and

mbcg 21

these were only four percent.

Titan got weaker, and the conversion provision became a nullity, and part of my proof on what the hard bottom line value here would be what the Franklin Bank as an arms length was willing to lend on these notes back in the period right around when the breach occurred, and all they were willing to give was 18 or 20 cents on the dollar loan value.

That is what the law of contracts requires. If you find that an onerous result -- I am not saying you can't give specific performance here, you can give specific performance. We will be entitled to credit for the payments we make to the first Mrs. Faggen, credit for the payments we made to the Franklin National Bank, and if you permit me to put on proof on the set offs, because of other damages, we would be entitled to reduction of the amount by what you let me prove there. But in any event, --

THE COURT: To hear you tell it, Faggen ends up a big loser.

MR. POWERS: Your Honor, it isn't a big loser to get your money out of a bad deal. If you can sell some General Motors stock you bought last year which has gone down 20 percent in value and you get your cash and put it into someelse of equivalent risk, you have gotten all that the law of contract gives you. You are entitled to the benefit of

mbcg 22

your bargain.

Take a look at what Judge Friendly said in that Celler case.

THE COURT: Wait a minute. Let's not be taking a look at what any other court said for the moment. I am trying to focus on what happened here. This would be a splendid result if I were Titan and I had -- losses like this are woth three times any victory that I might win in a case.

MR. POWERS: Well, your Honor, because the remedy of specific performance is here, and you are able to give that remedy, if the traditional contract was not --

THE COURT: Let's go back here. Come down from the clouds, Mr. Powers, and recognize the facts. Titan got to the courthouse steps first, filed a 10(b)5. Faggen counter-claimed on the notes relying, among other things, on the acceleration clauses. The notes as far as I know were legal outstanding obligations, and certainly that is true once it is determined on the merits that Titan, at least in the notion of this court, did not make out a case as against Faggen under 10(b)5.

So there we are. The defendants are entitled to a judgment dismissing the claim. The notes on their face which were entered into in arms-length bargaining say that when these certain things happen the acceleration clause comes into

mbcg 23

effect.

MR. POWERS: But the law says that an acceleration clause which gives more than just compensation for the depravation involved in the failure to pay interest, or the failure to pay principal, that kind of an acceleration clause is unenforceable at law or in equity. The law says if you take a bundle of rights and include them in an investment security, and say, "If you stay here for a period of your investment, this is what you will get," you can't leave in the middle of it and get what you would get at the end.

THE COURT: All right, I have you. What about legal fees?

MR. POWERS: On legal fees, we need a hearing. First off, we are paying legal fees to Franklin National Bank for their suit on a million dollars worth of notes. We are paying legal fees to Faggen's counselor for their side on a million and a half dollars worth of notes. We can't pay legal fees twice on the same block of notes. In addition, there has never been an issue here on our owing at least two million dollars net for the bundle of values that we got in the case, so that the real dispute on the legal fees here is on the overage after you net out the two and a half million dollars in notes in other people's hands and the two million we conceded was payable.

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There has to be a hearing, of course, on hours involved, who put in the hours, and so forth, and the court will make a determination under the normal quantum meruit standards.

THE COURT: I am surprised at you. You are too restrained here. I would have thought you would have pointed out that in the context of our suit, first of all Mr. Cooper's papers are distressingly vague as to hours and so on, to put it nicely and kindly. Right?

MR. POWERS: That is why we need a hearing.

THE COURT: Number two, it's questionable that there was anything except a de minimis amount of time really devoted to suing on the notes, so to speak. Really, the time that Mr. Cooper's clients were in by all odds the great overwhelming majority of time was devoted to the defense of Titan's 10(b)5 claim against Faggen. Therefore, the $50,000 is not only not reasonable but it's out of sight, to use the vernicular.

MR. POWERS: Yes, sir.

THE COURT: I am inclined to think you have got something there. Let me hear from Burton Cooper. Mr. Cooper, you know that recently our circuit court and a good many other courts in the federal system have held that you have to have some reasonable showing of time, what that time is devoted to, and we have nothing here.

MR. COOPER: Your Honor, I am aware of that. I

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would be prepared to submit to either an examination or affidavits on that score if that were necessary, but I think the more important issue, because your Honor came to it very quickly, is whether there is any merit to the argument that the acceleration of the notes --

THE COURT: I know about that. We will get to that in a minute. I want to hear about this thing.

MR. COOPER: About fees?

THE COURT: Yes, and a quarter of a million dollars. Your office didn't spend very much time on the notes qua notes.

MR. COOPER: Your Honor is absolutely right. As notes, if you take the argument that I was trying to address myself to, if you take the argument that we had no question of collection on these notes because we were having a 10(b)5 action, which was attempting to wipe out those notes, if that is a valid argument in a defense of something to collect, then I submit I have no case, but I would suggest,your Honor, that --

THE COURT: Let me point out something to you, and I am not sure how sturdy an authority it is, but some years ago I decided a case called Tartell against Chelsea National Bank. Tartell was a borrower at the Chelsea National Bank. He had several loans outstanding which had a clause about legal fees, comparable to the one which existed in your notes or

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your client's notes. Tartell, however, got to the courthouse steps first in that case, and he said -- I can never remember, is it regulation U that applies to bankers -- I never remember which one it is.

But whichever one applies to loaning banks, he stood under that, and that's what all the effort was devoted to, and Chelsea quite understandable in their pleadings and in the answer to the complaint of Mr. Tartell sought legal fees in the eventthey were successful, and they were, and I awarded a very nominal amount compared to what they actually sought. The matter went up to the Court of Appeals, and as I recall it, without any extended discussion, the Court of Appeals affirmed on the substantive issues and as well upon the award of legal fees.

For that reason, it may well be that neither the parties or the court focused particularly on legal fees issues. But as I recall, that was a very troublesome issue, and you can say, as you are saying here, "Look, we wouldn't have been -- it's ridiculous as a practical matter not to say that our expenses were devoted to collecting on the loan and the notes here, because we had to beat off this 10(b) 5 claim in order to vindicate our notes."

Well, I understand you, but it raises troublesome problems. Surely the law shouldn't depend on who hits the

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courthouse first. That seems a little bit awkward, to put it kindly.

On the other hand, as Mr. Powers argues, I don't think the federal courts at least are going to be very pleased with the idea that prohibitive counsel fees are awarded under clauses of this type, and thus be used in fact to discourage somebody from raising what he considers to be a bonafide claim under the securities law. It's a very --

MR. COOPER: Your Honor, parathentically I might say, as your Honor pointed out earlier, that we would not have this claim for legal fees had the interest been paid pending the determination of this issue.

I have, as your Honor well knows, said that all along. I find my client faced with a situation in which these notes were going to be declared worthless if the plaintiff prevailed, and I had to establish their worth. In order to prevail on the collection of these notes, that action had to be defeated first. I would take the obverse of the situation. If we had come into this courthouse first and sued on the notes by virtue of default, and then they came in with a defense of a counterclaim, would I not be suing on the notes?

THE COURT: That is what I meant. It seems a little awkward to -- I am rather afraid that that has become a difficult area almost by default. The courts haven't really

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thought through all the problems in hearing this kind of argument.

In any event, you agree that you have got to make a better record than you have made in terms of specifics?

MR. COOPER: Absolutely, your Honor. The only thing I would ask is that -- I don't know whether your Honor wants me to finish on this point and then address myself to anything Mr. Powers may have said --

THE COURT: I do, but I just want to finish this one.

MR. COOPER: I would say,your Honor, I would be willing to do that. The only thing I would like is if we can split this judgment. If we can get the judgment on what is now the outstanding amount on this claim and proceed to judgment on counsel fees, so we don't tie up this lawsuit by virtue of counsel fees. I certainly wouldn't want to jeopardize my client's rights.

THE COURT: No, I understand that. Let's turn to the claim of Mr. Powers in which he claims that his acceleration clause is void whether they are talking equity or law because that comes to an unconscionable penalty. Don't say anything about Section 29. Forget that. I think we should stick to his reply affidavit arguments. Those are the more cogent, I believe. Wouldn't you argee?

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MR. POWERS: I am going to go along with your Honor's point of view on this thing.

THE COURT: Well, he won't agree, but nevertheless I would say --

MR. COOPER: Judge, first of all, any purchase money instrument might be regarded as a penalty if the interest rate was greater than the recall rate of interest. I have cited a case for you in New York, Mandolino case, in which that specifically was analyzed by the Court of Appeals of the State of New York, in which they held there is no usury money to be applied to a purchase money instrument, and it is not a penalty and it is a dead instrument. So that argument, I think, falls quickly.

THE COURT: Well, certainly not even Mr. Powers has claimed that this is usury, so we can put that aside.

MR. COOPER: He hasn't reached that word, but he said substantially the same thing when he says that 2.3 million dollars worth of these notes was interest, so that I guess he is actually arguing that. The only point I think ought to be made is that it's a unique argument at this late stage in our development, and there are many learned heads, I think not far from here, that I think would be shocked to learn that a note that provides for acceleration is not enforceable because somebody may come in a claim that the interest that would

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be earned in the future constitutes unearned interest, and therefore the note is unenforceable.

If you take a look at the North Town case, which Mr. Powers relies on with great force, what does that case hold? It was a bankruptcy case. A borrower had faced bankruptcy. He went to another lender and said, "Will you refinance this obligation?"

The second lender agreed to finance it but provided that interest be paid to the end of the term.

The bankrupt failed to pay the interest when due. The lender then sought to accelerate all of the unearned interest, and the court held that that was a penalty because as to the portion which has not yet been earned, it was therefore a penalty.

THE COURT: Excuse me. This reminds me. May I have back that judgment, the proposed judgment I handed down to you, Mr. Powers?

MR. POWERS: Yes, I was busy arguing and I didn't reach it, your Honor.

MR. COOPER: What I was saying to your Honor on that case, we aren't seeking to collect on unearned interest. The default was on earned interest. That has been accelerated as the principal amount which has now to be paid. The uniqueness of Mr. Powers' argument is that -- well, there are

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several unique aspects to it -- first of all, he starts out by saying, and this your Honor, is in his papers, and is interesting,from a parenthetical standpoint -- he says --

THE COURT: Wait a minute. He has several sets of papers. Are you talking about his reply papers?

MR. COOPER: Reply, on page 9 -- page 15, paragraph 9 of his papers. Paragraph 9, page 15 of these papers he says, Faggen transferred 3.2 million dollars in assets in 1968 and Titan gave him a 3.2 million dollars promise to pay. I had thought that his complaint, which was sworn to said we only transferred 1.2 million dollars worth of assets. I thought he produced an expert who said we were only selling a business worth 7 to 9 times the after-tax return, which came to 1.4 or 1.48 million dollars, and now he says these notes when we transferred them, when we got our business transferred, we transferred 3.2 million dollars worth of assets.

The only reason for making the observation at this point, your Honor, is that there are so many numbers going around in these papers that really it boggles the imagination.

THE COURT: This is nothing new. It's been going on for some time.

MR. COOPER: The other point is he starts from the premise that because Mr. Shinogle came in and said this business

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when Titan transferred the notes which were worth 3.2 million dollars, their present value in 1968, that in some way Mr. Shinogle was testifying that the business was worth 3.2 million dollars in 1968. Nothing of the kind. All he said was that the present value of the notes were worth that. What Mr. Powers then does is he starts from the premise that since the notes were only worth 3.2 in 1968, therefore Mr. Eaggen is not entitled to get any money in excess of that, and he says that when he breaches in 1972, I have to start with a 3.2 figure and work down from it because the notes by virtue of their willful default are now worthless. I can imagine nothing more ridiculous than that.

THE COURT: Let me hear --

MR. COOPER: Just to finish this point, Judge, on the question of the notes themselves, I just want your Honor, to be aware of the facts that the notes call for a prepayment provision which, if Titan opted to prepay by virtue of a merger, let's say, and it's in the note, paragraph 3 of the note, if Titan opted to prepay to accelerate those notes, they would have to pay 105 percent.

What Mr. Powers now says that I default, I don't have to pay anything like the face amount, I don't have to pay the face amount and less what they were worth even in 1968.

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THE COURT: All right. I understand that. Incidentally, what about his argument that the notes aren't in evidence?

MR. COOPER: The notes are in evidence, your Honor.

THE COURT: That is what I thought.

MR. COOPER: The notes were part of the contract documents. They were exhibit 4. The contract documents were submitted to your Honor as exhibit 4. They were attached to the contract. If you are talking about the physical paper of all of the notes, all I can tell you, your Honor, is that when Mr. Faggen was on the stand, and I attached it to my memorandum, the first concession I got from Mr. Powers was, "Do you concede that these notes are in default?" And he said yes. I don't think I have to go any further than that, Judge.

THE COURT: No, I just wanted you to respond. However, doesn't Mr. Powers have this point, however, and that is this: We have holders in due course of some of these notes, right?

MR. COOPER: Yes, sir.

THE COURT: Therefore, your judgment is probably incorrect on that, isn't it?

MR. COOPER: No, it is not.

Actually, let's be factual about it. Here is what

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we got. Franklin National, which is one of the holders of the notes, have started an action. They have not yet been paid a dime, so I am not concerned with Franklin. I can get those notes back by simply paying them the money that they are owed, which is something like $200,000, get the notes back from them. They are held as collateral security for the repayment. Turn them over to Titan. So far as Clara Faggen is concerned, on her case Judge Ryan did not award judgment on those notes. What he did was he directed them to pay current interest or what was the equivalent of current interest. Those notes are up as collateral. If I pay in a million and a half dollars to the escrow holder, which was part of the agreement, I will get those notes back and turn them over.

THE COURT: Fine, but how does Titan get any protection? I believe you, but Titan may well not. How does Titan get any protection under a judgment which gives everything back to Harold Faggen?

MR. COOPER: Under the notes we had a right to bring this lawsuit as the holder, and the one point, that in the default of the payment of any installment of interest or principal which, upon 15 days after written notice thereof to the company, then at the option of the holder of any note in the series in which this note is one, all of the notes in such series shall immediately become due and payable.

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THE COURT: Yes.

MR. COOPER: So all of the notes are now due and payable.

THE COURT: I don't quarrel with that, but what I do raise is the question that the form does not say this in so many words, but I think implicit in his position is that --

MR. COOPER: I don't think there will be any problem at all, Judge, in wording this judgment. We will be paid the face amount of the notes plus interest to date --

THE COURT: But he, I assume, wants to be protected from any claims that Franklin, say, may make directly against him, or that the former Mrs. Faggen may make directly against him.

MR. POWERS: She has a judgment on her notes, your Honor.

MR. COOPER: She has a judgment only for the amount of the unpaid alimony or interest, which is $100,000, which I understand has been paid.

MR. POWERS: Plus $52,000 a year for life, and we are honoring the judgment. We didn't take it up on appeal.

MR. COOPER: The point I am making, Judge, is that the protection that they are entitled to is the protection that they will get the notes upon payment of the amount which is-- let's assume now that I can't deliver the notes. They don't

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have to pay me. Part of the condition of this judgment is that I deliver the notes, and if I deliver the notes they have to pay me the full amount of the notes plus interest.

THE COURT: What about this money they have advanced to Clara Faggen Gilbert?

MR. COOPER: They will get the credit for the amount which they have paid to her.

THE COURT: Shouldn't the judgment show that?

MR. COOPER: Judge, I was never apprised of the full amount or that anyone had yet been paid.

THE COURT: This isn't a blame finding affair. I am just trying to walk through this.

MR. COOPER: Yes, I understand that and I agree with you. If they will deliver to us evidence of payment of the count which they have paid to Clara Faggen Gilbert or her attorneys, I am not going to be bound by the amount they paid for counsel fees in reduction, because that was their obligation, and which they agreed to before Judge Ryan, I will reduce the amount of the judgment to the extent that they have made any payments. That I am perfectly willing to do.

THE COURT: All right. Now the last thing I want to ask you about is this: Do you understand, I assume, that this argument of Mr. Powers that somehow I cut him off?

MR. COOPER: Not at all, Judge, not at all.

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First of all, let us look at that argument. That is one of the most specious arguments. When this thing came up before Judge Ryan, they moved to amend the complaint.

THE COURT: Right, I know that.

MR. COOPER: They did not move to plead either an affirmative defense or counterclaim, never. Now, Judge Ryan said, "If what you are trying to do is to prove some kind of additional rescissional damage, which is what the 7th cause of action was addressed to, you can plead that and prove that under your present pleadings."

THE COURT: You mean they can prove that?

MR. COOPER: They can prove that under the present pleadings, but he never requested of Judge Ryan the right to plead a counterclaim or affirmative defense.

And let's look at the practical side of that, Judge. Had they pleaded a counterlaim, I would have a right to reply. We would have framed another issue.

THE COURT: No, but that is not quite what his argument is. His argument comes down to this: He said that he agreed with you representing Mr. Faggen and this court to try liability only. He says that meant to him he didn't have to prove anything about some kind of diversion of corporate funds by Faggen.

MR. COOPER: Judge, in the first place, every other

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part of the proof which was not related to the initial claim of fraud was related to the so-called amended or proposed amended pleading. He never offered to put in any proof dealing with set off. There was never such an offer of proof. The only reason he withdrew -- or I don't know what he reason he withdrew Mr. Castrovinci or Mr. Ferrara or anybody else he had in mind -- had to do with that he was claiming was rescissional damage, if at all.

Now, whether or not that was in his mind I don't know, but this case has now gone to judgment, and I have submitted some cases to your Honor in which it was held that a lawyer is bound and the court is bound by the lawyer's strategy during the course of the trial. This isn't newly discovered evidence. We haven't been coming into this case now with an application under some of the rules of this court which provide for an opportunity to reopen. He hasn't made such an application, and he couldn't make such an application.

One of the things we also said in our papers -- I don't know what rule this is coming under -- in any case, Judge, my point is that there was absolutely nothing to the argument that there was either, one, a right to prove or two an offer to prove anything by way of set off.

He rested, I rested, and the case went to judgment, and there was absolutely nothing in this record which would

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show otherwise, and I submit this judgment should stand.

MR. POWERS: Can I be heard, your Honor?

THE COURT: Mr. Powers, you are famous for always wanting the last word. I anticipated that, but would you confine your last word? What is it you want to speak of?

MR. POWERS: On the point you are just talking about.

THE COURT: All right, good.

MR. POWERS: In the posture of the pleadings, it was our duty to move to amend them for leave to prove post filing of the complaint activities. Faggen was taking away clients in the period after the filing of the complaint. We moved. Judge Ryan said, "You can put that on as evidence."

Now, we traversed their claim of damages by saying, "We don't owe you this amount of money, we don't owe you anything," in reply to their counterclaim. To say that the federal rules of pleading require us to replead what we were required to prove in that posture of the case is silly.

THE COURT: Wait just a minute. As usual you get so emotional and so fast that nobody can understand anything. Just slow down a minute. What you are saying, in other words, is that when Judge Ryan denied your motion for leave to amend, that that meant, as he put it, you would be able to prove certain things about diversion of business or clients or whatever?

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MR. POWERS: Right.

THE COURT: But you didn't do it.

MR. POWERS: Because you wouldn't let me. You said the damages were separate.

THE COURT: I didn't say any such thing.

MR. POWERS: I specifically reserved the right with Castrovinci, and you shut me off, your Honor.

THE COURT: Maybe you thought I did --

MR. POWERS: Let's look at the transcript. The transcript says, "Now, Mr. Powers, don't worry, you will be able to call the witnesses on the other issues."

THE COURT: Exactly, and you know what I mean, and I think it's clear from the record, that if Titan was right and was entitled to damages against Harold Faggen, you would be entitled to that. We agreed to that before trial on and off the record. No doubt of that.

MR. POWERS: Let's back away from the issue as a pleaded point, your Honor. Let's talk about the federal rules.

THE COURT: Forget about the federal rules. Forget about the pleadings. What I am saying to you is that I understood and I still understand that we only agreed to bifurcate this trial as to liability and damages. You have got to prove something showing that you are entitled to the damages.

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You didn't.

MR. POWERS: All right, I am entitled to damages because I don't owe Mr. Faggen five and a half million plus interest.

Whenever somebody comes into court and says, "I have a contract right to recover," and I traverse the issue of damages, don't I have a right to put on my case?

THE COURT: That sounds great.

MR. POWERS: That case was outlined in the prior proposed amended judgment, and Judge Ryan said I have a right to prove it.

THE COURT: I know, but many is the time that happens and then counsel for one reason or another decides not to. That is up to counsel.

MR. POWERS: Your Honor, if you threw all the pleadings out the window, and you said, "Mr. Powers, you are claiming that these things have happened since the suit was started and they are happening now, I can't in good conscience deprive you of your day in court to prove that Faggen is damaging the company and isn't entitled to as much damages as he is claiming here in his papers,"and you'd let me amend my pleadings now to put that proof on.

THE COURT: Wait a second. There is Powers' view of life and then everybody else who is out of step, which is

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the rest of us on this globe, I am afraid. You don't seem to want to focus on what I am saying. It's not a matter of pleadings. I quite agree with you. Judge Ryan said what he said, and I read that, but what my problem is, and still is and was throughout the trial, we agreed that you were to put on any evidence you had to show skullduggery, breach of faith, breach of contract, breach of ethics, or whatever, by Harold Faggen vis-a-vis Titan.

MR. POWERS: You cut me off on anything unrelated to pre-December 2, 1968. Everytime I asked one question that went beyond that week, you said, "How does that relate to prior misrepresentations before the deal was closed," and I said, "Your Honor, I will connect it, and you will see the relevance."

And you were very tight in restricting my proof throughout the trial on just that issue.

THE COURT: December 2?

MR. POWERS: That was the closing date of the contract.

THE COURT: I know. We heard more about what went on afterwards than we heard before.

MR. POWERS: You permitted it in subject to connection if I could show the relevance of these post-transaction facts that came on --

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THE COURT: Please, Mr. Powers, don't distort the record. We heard ample evidence of what transpired after the closing. We heard all about what went on. Mr. Kaufman got on the stand, He couldn't possibly have testified to what happened prior to December 2. The poor man wasn't there. What do you think he was testifying about?

MR. POWERS: I don't follow your last thought, sir. Would you please restate it. Mr. Kaufman was testifying to the negotiations leading up to the deal.

THE COURT: Not Mr. Kaufman, Mr. Frankel. I beg your pardon.

MR. POWERS: Mr. Frankel was testifying -- you were very tight in the proof you permitted me here.

THE COURT: I know everything I did in this whole trial off and on the record was unAmerican, illegal, and worse. I know your views about that.

MR. POWERS: That isn't my view. You tried very hard to be fair to me when I gave you --

THE COURT: Wait a minute. We had a lot of evidence. In fact, the great portion of the evidence was devoted to events of post-December 2, the closing.

MR. POWERS: But they were events relating to fraud in the inducement of a transaction in securities.

THE COURT: Fine, I thought you had nothing else

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but that.

MR. POWERS: This is straight set off. If I owe him six million dollars and he robbed me, and I can prove it, of $400,000 worth of business, it's a set off. It's just that simple. The problem is --

THE COURT: Also, as I understand it, don't you have a claim in the Supreme Court against him?

MR. COOPER: Exactly.

MR. POWERS: That is a set off against $100,000 in back vacation pay and other things that he is asserted in the Supreme Court, he asserted after this case was pending, and I tried to get this case joined with their case because I planned to prove those set offs, and they wouldn't let me. This case proceeded. There is another thing. What happened was you were glad to be done with a very difficult trial, and the day you read your decision --

THE COURT: Wait a minute. That is true, of course, we all were, but that is neither here nor there. You keep trying to make this into something it wasn't. What I am trying to tell you is I never felt that I was cutting you off on anything. In fact, I listened to a lot of dreary nonsense which was absolutely ridiculous on its face, such as the alleged breach of ethics of a man who was not even bound to the canons of ethics, such as lawyers supposed are, and so on

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and so on; and the loss of clientele, you remember, just after the closing, and so on. Don't tell me I cut you off. I didn't do any such thing.

MR. POWERS: You didn't cut me off on that. You were very fair on that.

THE COURT: You didn't say anything else.

MR. POWERS: Your Honor, the reason is these are all events that happened in the period prior to his firing, just before his firing, and since these are clients he has taken away. If I can in to you now and said before you enter judgment here I have the facts showing he is not entitled to this money, and wouldn't you let me put on my proof? These are events that happened between the filing of the case and the coming to court. It's a cut and dry contractual set off irrespective of the fraud, and look at the posture --

THE COURT: Contractual set off? I don't get you.

MR. POWERS: If we owe him six million dollars in full for a business, and we claim he took from the business $400,000 worth of gross revenues and it cut into our income, aren't we entitled to a set off? We are paying for the business and he is stealing it away with the other hand. I think the problem came up because, if you will forgive me, you got to the end of the case and you said on the record, "There appearing to be no defenses to the counterclaims, I

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feel constrained to enter judgment on the counterclaims."

Then I popped up and I said, "Wait a minute, your Honor, there are defenses to the counterclaims, and if they are not put on in the liability case, I have to put them on now, because if he is entitled to all the money, I still get my rights to proof."

Your Honor, it would only --

THE COURT: What is it you are going to prove? Tell me that.

MR. POWERS: All right, I am going to put on Castrovinci and Ferrara and Frankel to establish the following facts, that Faggen starts sending out announcements to all of the customers right after he was discharged and while he was still under a covenant not to compete in his employment contract and still under a duty of good faith in this contract that he is enforcing, saying he is now giving acturary advice, that he contacted a great many customers, and over the last two years he has taken away $450,000 worth of gross revenues from the company that only grossed a million dollars when we got into the deal; so he is saying, "Give me 6 million dollars while I steal 40 percent of the business with my other hand," and he is saying, "You are not entitled to anything."

THE COURT: That strikes me as something that you

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ought to have pleaded. I don't get this.

MR. POWERS: I did plead it, and Judge Ryan said, "Well, notwithstanding what that Fullman against Davis case says, put it in in your offer, all evidence." It's all through this appeal. We did depositions on it. There is absolutely no surprise. If you look at --

THE COURT: This is one of the bigger messes I will agree with you.

MR. POWERS: -- page 37 and 38 of my appeal brief, it's all there. Maybe the mistake happened because Judge Ryan should have let the pleadings get amended. He decided to do it an easier way, and says, "Go ahead, counselor, prove your case."

The next problem happened because we had a difficult time together on proof. You disagreed with some of my views of the law. There was a lot of tension between us, and you were glad to be done with the case at the end, but that doesn't mean you should deprive me of due process of law. I am entitled to a hearing on these things.

THE COURT: Please, wait a minute. I wish you wouldn't cloak yourself in all kinds of magical phrases that we hurl around with reckless abandon that only raises suspicions and anybody starts yelling in a commercial case like this about due process and --

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MR. POWERS: Your Honor, I am not yelling. I am stating something that I sincerely believe as a lawyer.

THE COURT: I know, but I just don't understand how in the world you could have sat around and said that.

MR. POWERS: Your Honor, I know from working with you for two or three weeks in that trial, if I would have asked one question of Mr. Faggen, "Did you meet with the ITU after you were fired in 1973," your Honor would have said to me, "Mr. Powers, what are you getting into that for? What has that got to do with securities fraud?"

THE COURT: I may well have, because I thought this was a securities fraud case.

MR. POWERS: When I stood up to complain about their going into damages on this 3.2 million, you said, "It's all right, I understand we are going to have a separate trial on damages." I had my experts lined up --

THE COURT: Damages to me mean damages in the federal lawsuit before this court. I never dreamed that it had to do with a lot of common law claims about swiping business, Duane-Jones against Burke, breach of covenant.

MR. POWERS: They are very carefully spelled out in those proposed pleadings that Judge Ryan said I could prove, and they are in this appeal, and we took depositions on them, and we had intensive discovery on the points, and I prepared

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three witnesses to testify on it for the trial, and you didn't let me get to the issue.

Now, maybe it's my fault. Maybe I am the guilty one, and I have been derelict in representing my client in not fighting with the court at every opportunity to let me --

THE COURT: I didn't say you were derelict at all. I just say that it strikes me as enormously wrong that we should have perpetual litigation about everything even after a trial. This case has been mismanaged, in my opinion, from start to finish, partly because of the extreme emotion, and the total lack of common sense, and both sides are somewhat guilty of this, and I don't blame you as men for this kind of thing happens, but there has to be an end sometimes, and I never understood what you were talking about a breach of contract or covenant not to sue, and so on and so on.

MR. COOPER: Judge, may I be heard on that?

MR. POWERS: These claims are all through the motions papers.

THE COURT: Look, I got this case, Mr. Powers, as you well know, at a time when it was after the time when some direction was made by the Appellate panel that this case should be tried. I tried my best to oblige. You were engaged. Finally, when you ended that engagement, we went to trial. I thought we were trying a federal lawsuit. It seems to me

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we are trying everything from domestic relations to fraud to tort to New York State contract problems.

MR. COOPER: Judge, may I be heard one second?

MR. POWERS: Before I sit down, could I answer.

THE COURT: Yes, I think maybe you should. I will have to go back and look at it all.

MR. COOPER: On this point --

THE COURT: I said I would hear you. I want to hear from Mr. Cooper.

MR. POWERS: Then I will come back with my last comment.

THE COURT: Not the last word this time.

MR. POWERS: I haven't met his points. Let me answer the issues. He misstated some things.

THE COURT: He hasn't made his points.

MR. POWERS: The points he made before your Honor. Why don't you let me answer them? I am not trying to burden you with something improper. I have a serious matter here. I am trying to defend 9,000 stockholders from losing money improperly. Can't I answer his point of view? The first issue here is, he said --

THE COURT: Mr. Powers, I didn't ask you to speak. Now you are really being rude.

MR. POWERS: Excuse me.

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THE COURT: You are really being rude, and I was hopeful you never would reduce yourself to that.

MR. POWERS: I apologize for sounding rude. I had no intention of sounding rude.

THE COURT: Mr. Cooper, what is it you want to say?

MR. COOPER: Judge, two points on the arguments that have been made on this mismanagement or divergence of clients issue, and aside the question whether it was pleaded or not, the name of the corporation for which Mr. Faggen worked was Harold Faggen Associates Inc. That name was changed to Titan Actuariaral Services Inc.

THE COURT: I know that.

MR. COOPER: The employment contract was with that company. Any claim that might be made, if there were one, would be with that subsidiary of Titan. Titan has no standing in this court to that claim, and they can't raise it now.

I have cited a case for you in my memorandum dealing with that specific point. This isn't, you know, the second after-thought ideas of where claims can spring up, and aside from everything else he has no standing with Titan Group to bring that action in court.

We are across the street in the state court. They fired us in January 1973. We sued for our salaries and our pension rights. They counterclaimed on this very issue of

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mismanagement and diversion of clients in the sum of $5,000,000.

THE COURT: That suit is still pending?

MR. COOPER: That suit is pending. They aren't going to be deprived of a day in court on this issue.

MR. POWERS: Your Honor, we moved to consolidate that case with this when it was filed, and the wrong here is that we are being asked to pay $6,000,000 that he has been in the midst of stealing away from us. The corporate veil between a subsidiary and a parent is irrelevant to that issue.

THE COURT: Wait a minute.

MR. POWERS: We bought a business --

THE COURT: Forgive me, Mr. Powers, but as usual, you jump to the slightest and worst conclusions about everybody else except your interest. You agree that there is this pending suit across the street in the Supreme Court, and you agree also that these issues are in that case?

MR. POWERS: Yes.

THE COURT: All right. Perhaps you are wrong, perhaps I am wrong, I don't know; but I had thought that we were trying a 10(b)5 case. I had also thought, I read Judge Ryan's memorandum, and I am sure -- I may have read it incorrectly with a wrong emphasis -- one of the things he was saying was that it was too late to go into that in any event, and that certain matters he thought you could have raised as

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an evidentiary matter.

I never heard you offer to raise these matters as an evidentiary matter. You never even made an offer of proof about that.

It is true you said something about recalling Castrovinci, you are quite right about that, but I understood that then, and I think today was reasonable in understanding it then to mean that if we got to damages, as to what Faggen owed Titan, then we would hear further from Castrovinci and others. I understood that.

MR. POWERS: Your Honor, the case was always what Titan owed Faggen. We always owed him something. We always owed him two million dollars. That was conceded in the papers.

The question was, after you are finished on liability, how much did we owe him, and it was subject to set off. Incidentally, that state case was filed years after this case started, and it's very common --

THE COURT: It couldn't have been too long after, because this case was filed in 1972 and this is only 1974.

MR. POWERS: It was filed in '73 and it was filed after we moved to amend here, and he told us we could prove these.

THE COURT: Mr. Powers, I can't be responsible. I wasn't the judge who decided not to consolidate this. I don't

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know what you are talking about. What can I do about that?

MR. POWERS: It's very common when you have one fight going on with somebody, he is trying to get a great deal of money out of you, and you feel you have been wronged, to have a counterclaim and set off against him. Here he filed a separate suit in State Court. We have a right to plead the same things in State Court, and whichever case comes to trial first is the case where we prove our rights. This was the tribunal of choice. We made this motion to amend here first, and we tried to go forward with it here, and I tried to go forward with it at trial, and I respectfully ask you to please let me put on proof on those set offs.

THE COURT: I am sorry, but on that I disagree. If I thought Titan was going to be out of court, I would take a different view.

MR. POWERS: We are effectively out of court when you tell us --

THE COURT: No, you are not out of court.

MR. POWERS: When you tell us that he can divert 40 percent of the business --

THE COURT: Mr. Powers, I know how you feel. I have been telling you ever since I first met you that you are very, very much emotionally involved in this, and I don't blame you because you are a director of the corporation, and because you

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are very loyal to your client, and I understand that. I don't hold that against you, but it doesn't help for you to make these shrill accusations particularly after the amount of time we all invested for better or for worse.

I am not going to claim to be Solomon in these matters, but I am a little tired of being told constantly how wrong I am and how wrong everybody else is except you, particularly since your client, I think, is not being jobbed to the extent that you truly claim it is here.

So here is what I am going to do: I am going to reserve on your motion in respect of the penalty aspect of it. I want to look again at these cases, because among other things, Mr. Cooper just served you and me with a memorandum as recently as this morning, apparently, and I never saw it until after lunch. So I haven't really read it carefully.

Second of all, I want to think about your penalty arguments. However, I flatly disagree with you about this idea that somehow I cut you off about something that I had no reason to understand I was cutting you off at all about. I am not going to reopen the trial to allow you to try here New York claims which would not be cognizable in this court at all were it not for the section 10(b) 5 case.

Normally, it is true we have the doctrine of pendant jurisdiction, but I feel that under the circumstances I wasn't

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properly advised that this was what was afoot at all. When you mentioned Castrovinci, I thought and I believe I had every reason to not only thing but absolutely assume without fear of contradiction that you intended to call Castrovinci back to the stand, which I quite understood, in the event that I held that Faggen was liable to your client.

Once I determined that Faggen was not liable to your client, that seems to me to be the end of it.

MR. POWERS: Your Honor --

THE COURT: Please don't interrupt me. I am trying to rule, for better or for worse. I know whatever I say you won't agree with. There hasn't been anything that has happened in this case that you agree with, I understand that, and I don'tblame you, but I wish you wouldn't interrupt me when I am trying to rule here. Would you permit me to rule, or do you want to --

MR. POWERS: All right.

THE COURT: Would you rather I not?

MR. POWERS: Your Honor, I am trying to talk to you as a lawyer.

THE COURT: I have given you every opportunity. You have had most of the time here. Now, please. Everything I do you find wanting, I know that; but there comes a point where we have to stop this.

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MR. POWERS: What you are doing is remitting me to a three years to collect for the diversion of business you are telling us to pay for here today in your judgment, when the proper way to prove this is to --

THE COURT: Now, listen to me. I am just about to rule. If you don't like my rulings, you have every right to appeal, but I am not going to have endless argument with you any further. I can't even remember what I was saying, thanks to your diversion, but I think I was saying that ordinarily, if we had to start all over again, it may well be that I would have taken these claims, because they could be, I suppose, considered pendant claims, although I am not positive of that, but I am willing to say that.

But at this late stage, and since I don't think you made yourself clear at all, in fact I didn't think you made yourself clear for one good reason, that you thought, just as I thought, we were talking about Castrovinci testifying in the event Titan failed in its case here in a strictly federal 10(b) 5 case, and which I thought we were trying, and I still think we were trying.

I might be constrained to open up the case again, simply on the grounds of fundamental fairness to tighten if I thought that Titan didn't have its day in court anywhere else, but Titan does have its day in court. Titan has a suit pending

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over in the Supreme Court of New York, where Titan is a party in that suit in which these very claims are being asserted.

MR. POWERS: Your Honor, we have --

THE COURT: Would you please listen to me, Mr. Powers? As Mr. Powers, you yourself have agreed, these claims are asserted by you, I guess in a way of counterclaim, I am not sure -- nobody has ever showed me the pleadings and there is no reason they should -- but you agree that these claims are asserted. Furthermore, I don't think even you can argue that they have anything to do with regard to the 10 (b)5 case as such or the fraud in the inducement case as such or the countersuit by Faggen on the notes as such.

What they do have to do with are common law damages which your client may be entitled to in a state court suit.

There is nothing unusual about leaving your client to that remedy and the exercise of discretion at the very least. I see no purpose in having this court act as a vacuum cleaner to pick up every claim which is not directly cognizable here, in view of the fact that I was totally of the view, and I am still of the view that this was never brought to my attention at all.

That only leaves the problem of Judge Ryan and his ruling, and the memorandum, which I have read. It is true that he said what he said, and it could have been construed the way

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you say it should be construed, but then I think it was your duty to make it clear to me during our lengthy trial that this was what was going on, and you didn't. So for that reason I am going to rule against you on that facet of your motion. I am not going to rule against you, however, on your motion which has to do with the hearing on counsel fees. Specifically--please, Mr. Powers, would you mind sitting down. I am trying to dictate an opinion here without your help and interruption, if you don't mind.

There I quite agree Titan were entitled to two things. First of all, we have got to have some affidavits from somebody in your office, Mr. Cooper, as to how much time was expended by your office, by whom, when, and what it was related to.

Second of all, if Mr.Powers wants to have a hearing to examine or cross-examine anybody on this, I think he and Titan are entitled to that, but the first step is for you to file affidavits.

Finally, I am going to reserve decision on so much of Mr. Powers' and Titan's application which raises this penalty or forfeiture point. I am frank to say that I am not convinced so far that Mr. Powers is clearly right. I don't think his cases have anything to do with our problem really, or put differently, they are inopposite, to use a

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typical lawyer's and judge's phrase; or still alternatively, the cases are distinguishable, that he raises, from our situation.

Fourthly, I am rather inclined to think that, as I understand, the Court of Appeals of New York, they have never deemed it an acceleration clause like this in a piece of paper such as a note or other debt evidence as being illegal, as a penalty or forfeiture, and I don't see how a federal court even today can ignore the highest court of New York in that regard, particularly since the notes, as I recall it, were entered into here.

But as I say, Mr. Powers and Mr. Cooper, I will look again at Mr. Powers' arguments, and I will file a brief memorandum on that aspect of the case.

Assuming I agree with Faggen, then I think a bifurcated judgment should be entered under Rule 54 saying, there being no just reason for delay, we will enter a judgment on interest and the face amount and reserve attorney's fees for further proceedings.

If I determine the matter in Mr. Powers' favor, then I will have to write a lengthier screed explaining then what happened.

All right, Mr. Powers, I really feel I know you don't agree with anything. I know you would love to argue.

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You are an indefatigable partisan. I give you credit for that. I know you are, and know you are sincere about that, but you just can't argue these things forever.

MR. POWERS: Well, let's talk about the last thing you said. We have to have a single complete judgment to deal with, your Honor. If we have a bifurcated judgment, particularly with these two other pieces of the notes hanging fire, we have problems. I think you should suspend judgment until we have a hearing or a determination on the attorney's fee issue which you plainly left open.

Secondly, with your permission, I'd like to give you two other thoughts on the damage issue and penalty thing that you left open for further consideration.

First, it is Mr. Faggen's witness who said all these notes were worth was three million two.

THE COURT: No, let's not hash that over. I am aware of that.

MR. POWERS: And Mr. Faggen said earlier all they were worth was four million.

THE COURT: I have heard that one ad nauseam. Let's not repeat every strand of this case, Mr. Powers.

MR. POWERS: Is he claiming he just gave the business away, he got 3.2 million dollars in value, and he gave 3.2 million in value? The fact that we claim we were defrauded

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we claim we got less, you decided that issue. I am not going back to say --

THE COURT: You have already said that again. This is not new. You have some idea today that if lawyer Powers continues to say something, that is it. That means the Judge has got to roll over and do it.

I have heard you, and I have treated you most fairly, contrary to your insinuations earlier today, indeed, throughout the trial. I know you have to do this, and now you don't probably mean it as badly as it sounds. You are just a scrappy fellow, but I am telling you now it is very hard to be patient with you because of your constant insistence on having the last word.

I would assume that that is fair enough as far as it goes, but it can go too far. I have heard all of that. It is in your papers too.

MR. POWERS: On the final point Mr. Cooper made, which isn't in my papers, he said in order to call the notes, we had to pay 105. The reason for that was they were investment securities, and we couldn't take away Faggen's 10-year rate on the stock which could make the notes worth 150 or 200 over par, and that we couldn't even exercise that right until a couple of years had gone by, because it was so valuable to Faggen, and it's the whole bundle of things that

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makes the issue.

THE COURT: All right, thank you.

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TITAN GROUP, INC.

v. 72 Civ. 1797

HAROLD FAGGEN

May 2, 1974
2:20 p. m. - Room 128

THE COURT: Well, gentlemen, once again I find that we are going on with more diversions and obfuscations which nobody seems to want to stop in this great case.

First of all, I have this letter from you, Mr. Powers, in which you say, "As per instructions from your office we resubmitted the amended judgment." I don't know anything about telling you to resubmit or submit an amended judgment, but be that as it may, I gather you mean by that you are delivering an extra copy of whatever this matter purports to be.

Your letter goes on to say something about the original papers which I finally received.

There is an affidavit here in which you, as you frequently have done in our association, put words in my mouth that I don't recall uttering, and I am just as puzzled, as I usually am with these obfuscations, because I don't know what you are talking about; so in order to get to this

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as fairly as I know how, you will have to tell me.

What is this all about?

MR.POWERS: Two issues, your Honor. First, we have paid roughly $300,000 of the amount already that is in your judgment, and I would like the judment to give us credit for that payment because it will save the company bonding costs and security for bond.

THE COURT: There is no proof before me. I don't say your company has not, but what do you expect me to do? I don't know these things.

MR. POWERS: I have the receipts for the payments annexed to my motion papers.

THE COURT: I don't know what you think the judge and clerk do, but if there is no evidence about any of this we are not going to pull figures out of the sky.

MR. POWERS: There is evidence. It is annexed to my affidavit.

THE COURT: Sir, fine, but everytime we do anything in this case you are running in with new evidence. You don't seem to get the point, and I get little help from your adversaries, so I find it is really like going between the rock and whirlpool, dealing with your two offices. I feel like somebody who is being pelted from both sides of the aisle.

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Listen to me: If there is any credit you should achieve, or receive, for Titan on this judgment, I would be the first to agree that should be done, but having consulted with Mr. Cooper? Perhaps they are just as befuddled as I am by your machinations. I would think if Titan has paid part of thisthey should be credited for it, but why bother me?

MR. POWERS: I raised to you the existence of one payment and the intention to make the other payment.

THE COURT: Mr. Powers, you have said so many things to me each day that I have been associated with you that I could not possibly recall them. Moreover, I can't remember the diluge of papers you have blitzed this court with from one day to another.

MR. POWERS: Bear with me.

THE COURT: Third of all, I have learned I can't have much confidence in what you tell me, in any event.

Why do we do things like this? You know, this court is not the court that enters judgments and calculates interests and decides whether or not there have been payments. I have no information or desire to do this.

MR. POWERS: Bear with me. I think I can clarify it.

THE COURT: Stop talking to me and hear what I am

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saying. Sit down.

Mr. Cooper, I admit you don't do what Mr. Powers does, but you have an irritating way of never giving me any information either. I don't know what this is about.

Is it true that Titan has paid $300,000? If so, can't this be adjusted between your office and that of Mr. Powers?

MR. COOPER: Your Honor, yes, it can. So far as whether or not we know anything about it, your Honor, I have not gotten any papers from anyone which evidences payment, and all I have ever gotten is either a letter from Mr. Powers, which was a copy of a letter sent to you, or at a subsequent date an affidavit to which I attempted to respond, either by a letter in response to his letter or if the affidavit is now simply a restatement of what was contained in the letter, our letter was responsive.

I submit I recognize your Honor's problem. I am as befogged and bewildered by this rain of papers that we have been getting. I don't know whether half of what Mr. Powers says in his affidavit is factual. If we will get proof of payment, your Honor, from those who have been paid, we will be glad to execute a partial satisfaction of the judgment pro tanto.

Unfortunately, Mr. Powers application embodies not

pgcg 5

only credits for payments made to those who are entitled to payment, but seeks to be credited or so for attorney's fees, which they were obligated to pay by reason of their defense to those actions which they lost. We see no reason why Mr. Faggen should be obligated to pay counsel fees on actions which Titan was responsible for having instituted.

THE COURT: Since that is none of the business of this court, there is no evidence of any of that before this court, this only confirms my total incredulity that any mature man, let alone an experienced practitioner, would be doing things; but I have long ago learned that my notions of what should go on in this world don't accord with some of those of yours in this case.

Mr. Powers, may I suggest that I am not going to do anything to change this judgment today at all. On the other hand, I quite agree that if your client is entitled to some credits as against this judgment, they either ought to be the subject of a part of a partial satisfaction, or, if not, that some kind of amended judgment to reflect whatever credit in amounts they are entitled to. I am not responsible for this. That's not my function. Even if it were, it has not been brought to my attention. There is no evidence before this court of anything. I don't know all these things. The clerk doesn't know all these things. I don't understand

you.

MR.POWERS: Sir, it is before you. It is in my motion papers.

THE COURT: Motion papers I don't have.

MR. POWERS: Annexed to the affidavit. Here are the receipts (indicating).

THE COURT: Mr. Powers, they are meaningless to me. I don't know what those mean.

MR. POWERS: I tried to very carefully explain them. One is satisfying Judge Ryan's judgment with a letter from counsel acknowledging I satisfied it. The judgment is annexed.

There is another letter acknowledging a following paper on the judgment by another judge. They are duly executed receipts. It is all there is.

THE COURT: It is not my function to act as an amenuensis and a figurer for you or anybody else.

MR. POWERS: I am not asking you to figure anything. I am only saying, give us credit in the judgment for these receipted payments.

THE COURT: Mr. Powers, you owe yourself, me, and everybody else the obligation to think most carefully before you leap again. You didn't even discuss this, let alone serve these papers upon Mr. Cooper.

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MR. POWERS: I did serve the papers.

THE COURT: He doesn't understand any more than I do.

MR. POWERS: This is obfuscation by my learned adversary. He knew we were paying the judgment. The notes remain in the hands of those people.

THE COURT: Mr. Powers, I don't want to wrangle with you.

MR. POWERS: I don't want to wrangle with you.

THE COURT: I don't know about that judgment.

MR. POWERS: I gave you an affidavit.

THE COURT: I am not the judgment clerk.

MR. POWERS: This is not asking you to be the judgment clerk. You entered a judgment after I had said to you that we are paying $300,000. The reason you entered the judgment is my adversary didn't submit an amended judgment, even though they said they were going to. I submitted that. My only motive for wanting credit on the amended judgment is to save some money by putting up a $6,000,000 bond instead of--

THE COURT: I don't quarrel with that at all.

MR.POWERS: That's all of the issue that is before us.

THE COURT: How would I know this? You just seem to be hell bent to judge badger the daylights out of every-

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body, including this court. I cannot do this kind of work on your representations. I am sorry, but I can't.

MR. POWERS: Your Honor --

THE COURT: Mr. Cooper --

MR. COOPER: Yes, your Honor.

THE COURT: Is there any possibility that you and Mr. Powers could sit down and decide this? I don't know the course of dealing. I don't know about all these other cases. I was not there.

I would agree with Mr. Powers to this limited extent: If this judgment is incorrect obviously it should be corrected, but I am powerless to do anything with the follies of counsel in this case.

MR. COOPER: Your Honor, I must say I have attempted in every way I know how to try to be as understanding as I know how in the trial of the case, and also in the subsequent matters that came before your court from Mr. Powers. I submit to your Honor that at the trial of this action on which most judgments -- and the only way I know the judgments are arrived at, there was no proof submitted before your Honor with respect to any diminution of any amounts on the strength of which your Honor entered a judgment -- subsequent events, Mr. Powers now has what he claims to be a credit that he is entitled to. I submit that the proper way to handle that is

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to give him a partial satisfaction of judgment, and that be the fact, and the judgment will be partially satisfied to that extent.

I certainly, however, would not agree to any partial satisfaction of any judgment which would include the amount that was paid by Titan as counsel fees, which was the amount which he is now attempting to charge Mr. Faggen for in the defense of the Clara Faggen Gilbert matter and in the Franklin National Bank matter.

As to any payments which me made to the creditors directly, I have no objection to issuing partial satisfaction upon proof from each of those parties that they have been paid.

MR. POWERS: Your Honor, the proof is annexed to our motion papers, a signed letter from the lawyer in one case saying he got the $107,000, and the other proof is in a court order by stipulation.

THE COURT: I am not going to repeat this, but once more: (a) I have no knowledge of these events; (b) I am not a judgment clerk; and (c) there was no proof of any of this before this court, quite understandable, I assume.

It really had nothing to do with our case-in-chief.

MR. POWERS: They were paid after the case was over.

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THE COURT: I would think from what I read that possibly some payments were made. What they had to do with, I would not know; but to ask a judge, in the manner in which you come in here, is probably one of the more incredible things that I can recall seeing since I have been admitted to the bar. This has been the most unbelievable affair from start to end that I can imagine.

You are entitled to a satisfaction if the payments have been made, but I am not here to be taking care of those problems. I was the trial judge, for better or for worse. I have entered a judgment, for better or for worse. If your client is entitled to a partial satisfaction, that is something that I would presume you would have to work out between Mr. Burton S. Cooper and yourself; if there is any difficulty why, then, I suppose you could make some appropriate application somewhere -- I don't know where -- maybe even this court. I didn't think we were in that business, but federal courts seem to get into every kind of business these days, and therefore I may be wrong.

MR. POWERS: My only motive for asking for an amended judgment instead of a satisfaction is that it saves money on the bonding requirement.

THE COURT: I am not in business going around and saving money and doing little tricks and devices and clerical

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duties for the people who want to save money understandably. That's not my job. It is demeaning to listen to such nonsense.

MR. POWERS: I would like to turn to the second issue.

We have a set of five million notes that have now been merged in the judgment. Mr. Faggen has possession, I believe, of most of them, except for one and a half million in the possession of his ex-wife's trustee. To the extent he has possession, those notes should be marked merged in a judgment and not subject to further negotiation, or they should be deposited in court because the judgment has taken the place --

THE COURT: Again, why don't you communicate with the lawyers and Mr. Faggen? I'm not representing either Titan and/or Faggen.

MR. POWERS: Mr. Cooper has refused to do this. He said, "I have the notes and until the judgment is paid I want both the judgment and the notes."

My submission is, as a matter of law, the notes did not exist. They have been merged in the judgment, and we must be protected from holders in due course. That's the issue.

THE COURT: Do you want me to take care of this?

MR. POWERS: It is a simple matter. All you have to

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do is say something in the judgment, that this judgment shall be satisfied upon delivery of the notes and pending delivery of the notes either they get deposited in court or a legend is put on them so we don't have to pay twice by a claim holder.

THE COURT: Where were you in the intervening week between the end of the trial and April 22?

MR. POWERS: I made this argument before your Honor on the day you were here and you entered the supplemental memorandum.

THE COURT: You didn't do any such thing. We were focusing on other issues.

I know you have consistently, from the day I met you, and I know you will never cease, constantly put words in my mouth and I am bewildered by your razzle-dazzle which I have come to absolutely not trust. I am sorry to say that but it is a fact. We argued issues. I fairly stated those issues and I understood them. I made my ruling, but I am tired of being everlastingly accused of doing all these things you constantly say I have done or failed to do. I would not know what I could ever have ruled upon as to whether or not these notes merged into the judgment. I never heard of any such things.

MR. POWERS: Do you recall when I stood in this room before you --

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THE COURT: I recall you speaking like a machine gun day after day and you started out more things that I never executed. I agree to that.

MR. POWERS: Does your Honor recall making a statement to Mr. Cooper, "Aren't these people entitled to some protection?"

THE COURT: I have no doubt I did. That doesn't mean that I am obligated to immediately do something about it in a judgment. A proposed judgment was presented to the clerk and through the clerk to me. You raised certain issues. We had a hearing. I decided some. At the hearing I reserved decision. I banged around looking at your irrelevant cases, and I finally found out that you had an argument based on totally different authorities than you were good enough to cite to me, and I wrote a memorandum. None of that had to do with this issue.

You ask for perfection from everybody except one person, Lawrence Powers.

MR. POWERS: I am not going to make any answer to those comments. All I can respectfully state to the court is that there is a risk that holders in due course will get these notes from Mr. Faggen --

THE COURT: I would not doubt that, but what can I do about it?

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MR. POWERS: Put a sentence in the judgment that says that the judgment is satisfied by delivery of the notes, and that the notes must, pending satisfaction of the judgment, either be deposited in court or legended so if any alleged holder in due course gets them he is on notice that they have been made part of the judgment.

The cases clearly make it appropriate to do such a thing where you have a piece of negotiable paper possibly floating around.

THE COURT: I am not sitting around reading cases while it is your problem. You have a duty to treat me more fairly than you have treated me on any occasion, including this one. How in the world -- I don't doubt you might be right, but I don't know that. I am not in the business of anticipating your problems.

MR. POWERS: Your Honor, I am here --

THE COURT: You never submitted a cross-judgment.

MR. POWERS: The reason for that was,your Honor, that my adversaries said they were putting in something to deal with the problem, and then they decided not to. As soon as I knew this, I submitted a counter-judgment, but you had already answered theirs which had never been served on me before.

If you would like the law on this I have three or

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four cases with me. I can hand them up to you because I made Xerox copies.

THE COURT: I will not trouble myself in doing something you should have done long ago. That's unfair. It is perfectly obvious to me what you have been doing, and you are consistent. I will credit you for that.

Look, I have got to ask you, Mr. Cooper, did you ever receive a copy of this proposed amendment judgment? I received a copy on April 30.

MR. COOPER: We received it on the same date, your Honor, maybe a couple of days before.

MR. POWERS: They received it the same day I filed it with the court. They say so in their letter.

MR. COOPER: The same day, Judge. April 26.

THE COURT: Is there any reason, why, as Mr. Powers suggests, we could not enter an amended judgment giving the Titan Group credit for any payments? Forget the attorney fees. I don't want to debate with that one.

I am entitled to some help. All you birds do is just give me the business.

MR. COOPER: Judge, I don't know why I am placed in a position now of having to accommodate Mr. Powers with respect to an amended judgment which would now have to be re-entered when I have already agreed I would give him the satisfaction

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of that portion which has been paid when we have proof of payment. I don't know why he is entitled to that kind of relief and I am not entitled to get issued partial satisfactions on proof of payment, what I would regard as adequate proof of payment. I want from each of the parties -- I want not from the attorneys but I want from Clara Faggen Gilbert, a release running to us for the extent of the amount of those payments.

THE COURT: I can see that being a possible desire on the part of you for your client.

MR. COOPER: I don't see how they are burdened by it either. They will get the satisfaction. All they have to do is provide the proof.

THE COURT: He wants to get a cheaper bond.

MR. COOPER: I will accept that. If that's what he is concerned about, I will accept that. I will accept a bond of $6,100,000 if he wants to file that.

MR. POWERS: We have solved one problem. If we can put up a bond for the lower amount, your Honor doesn't have to bother with that issue.

THE COURT: You don't seem to have caught on yet.

I cannot, Mr. Powers, be asked, as a United States Judge, to go out and find out about Clara Faggen and the Franklin National Bank, and it is not my duty, as I see it,

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to do those details. If it is decided that it is, we are going to have a very different sort of goings on around here.

MR. POWERS: I thought that bringing in Judge Ryan's judgment, which was filed in this court, and bringing in receipts from the people who got payments under Judge Ruan's judgment, was adequate proof. What more proof could I have?

4 THE COURT: Mr. Powers, you don't seem to get the point. I do not sit around here waiting to get proof, waiting to do this and that, and this kind of context. I don't. This is not my function, particularly when there is nothing in the record that helps at all.

I am not blaming you. These were matters that were not before the court, but you don't want to seem to accept that, and I am not surprised.

What I will do, I will not enter the amended judgment.

I will ask that you accept the generous offer to get a bond for the lower amount and effect a chance to get satisfaction releases from Clara Faggen and the Franklin National Bank, and then give the Titan Group a partial satisfaction. I think he is entitled to that. Certainly, I, as a lawyer, would not want to deal with the situation differently if I were representing Faggen.

On the other hand, if I were a lawyer representing

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Titan, as you are, I would want to get satisfaction pieces. I agree to that.

MR. POWERS: Could we move on to the other issue?

THE COURT: I don't know what the other issue is.

MR. POWERS: Keeping those notes from going back into circulation when they are merged in a judgment and they no longer exist as a matter of law -- the judgment has replaced them.

The causes are very clear on this. They now have a higher right than they had in the notes. They have a judgment. The notes can go into someone else's hands and we could have a problem of being asked to pay twice.

THE COURT: Can't you make arrangements among yourselves without bothering the judge about this. I don't get you.

MR. POWERS: I tried to get this with Mr. Cooper. Mr. Cooper says he wants to hold the notes as negotiable instruments until the judgment is paid. I submit he is not entitled to it. You have to resolve it.

THE COURT: If I were Mr. Cooper, I would arrange to make sure of that, first, I, representing Titan, wouldn't pay anything until I saw the notes being ready to be handed over. Why do you have to come in and badger a judge to referee any easy thing like that that lawyers work out. I don't under-

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stand you. I am not equipped to deal with these problems.

MR. POWERS: The problem is that your judgment is a contract to pay.

THE COURT: The court entered a judgment. It is not the court's duty to enforce the interest of respective parties under that judgment except to the extent delineated by law. I know of no law that requires me to referee a dispute between you and Cooper about this.

MR. POWERS: I am only asking your Honor to take a judicial step which takes these notes out of circulation so someone else --

THE COURT: I am not about to take these notes out of circulation until I have some assurance that Titan is going to pay the judgment.

MR. POWERS: We are going to bond it and appeal.

THE COURT: You can't have your cake and eat it too. What you really are doing is asking me to do things that judges don't do. What you plan to do from now on I don't know. It is none of my business, but you are not going to pay this judgment.

You are going to take an appeal, I assume?

MR. POWERS: Yes, sir.

THE COURT: Why are the notes to be cancelled?

MR. POWERS: What are we going to do if Mr. Faggen

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takes the notes to some bank and pledges them and the bank becomes a holder in due course? The Court of Appeals says, "pay the judgment." The holder in due course says, "pay the notes." We will be paying on the same chose in action twice.

THE COURT: Can't you think of one simple idea? Can't you ask Mr. Cooper to put these notes somewhere in escrow pending the appeal?

MR. POWERS: That's what I said on the record: Deposit them in court or bring them in to court and legend them.

THE COURT: I am not in the business of legending securities.

MR. POWERS: Can I ask you, then, to ask him to deposit the notes with the clerk of the court.

THE COURT: I don't want to do that. You are grown men. Start acting like grown men.

Mr. Cooper, is there anything wrong with an escrow arrangement for these notes so that they don't get out into the hands of holders in due course?

MR. COOPER: First of all, we don't have all of the notes. One and a half million are held in escrow already by Mrs. Faggen. That's number one.

Number two, so far I can tell you what my objections have been. I tried to express them earlier to Mr. Powers.

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I will state that now.

Mr. Powers is now asking for something which he never had during the pendency of this action. Mr. Faggen could have negotiated these notes while the lawsuit was pending. So far as the judgment is concerned, your Honor, until we are paid I don't want to give up a valuable property right in these notes.

THE COURT: I didn't say you did. I don't blame you for that.

The futility of this 35 minutes is so apparent. Both of you are really imposing on this court, asking the judge to do the kind of things judges do not do for very good reasons, because they don't know and they are not adversaries. I just think this is the most frightful thing I have been through in many a moon.

Let's go back.

MR. COOPER: The question you asked about escrow notes, those notes that we have we will escrow pending payment of the judgment.

MR. POWERS: That solves the second problem.

THE COURT: Why couldn't you do that without beating me in your usual fashion? I am ashamed to be even a part of this.

Let's recapitulate. As long as we have wasted this

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much time collectively, I want it understood -- and you correct me if I am wrong -- number one, in response to Mr. Powers' first concern, Mr. Cooper, you have very fairly agreed to accept a bond on appeal of less than the full amount of the judgment, roughly $300,000; is that correct?

MR. COOPER: Yes, your Honor.

THE COURT: That is very generous of you, if I may say so.

Number two, you will as soon as you get your hands on any of these notes you will escrow them and assure Lawrence Powers, who is acting for the Titan Group, that they are in escrow, sufficiently tied down, so that they won't get out into the hands of the holders in due course.

MR. COOPER: We don't know what it exactly means, but I am willing to say those notes will be escrowed pending a final determination of any appeal prosecuted from this case.

MR. POWERS: I will accept him as an escrow holder if he keeps that in his office. I have no objection.

THE COURT: What else?

MR. POWERS: That's all.

THE COURT: You are sure?

MR. POWERS: I am sure.

MR. COOPER: Is it clear, your Honor, that the amount

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that the judgment bond is for is for the payment made to parties and does not include the amounts which were paid out for counsel fees? I don't know if that was clear. I don't want to have to reduce --

THE COURT: You are talking about the $11,000?

MR. COOPER: There is approximately $26,000 paid out in counsel fees added to the amounts paid to Clara Faggen Gilbert and to the Franklin National Bank.

THE COURT: I am making no determination here, and I don't hear Mr. Powers asking for it.

MR. COOPER: It was in his papers.

THE COURT: I am not doing anything like signing what is submitted by him. He has approached it a different way at last. He seems to be satisfied.

I think you are. I am not signing your amended judgment. You understand that?

MR. POWERS: Yes.

MR. COOPER: Your Honor, I have only one parting reminder. You would be finished with this case except for the fact that we have moved returnable in two weeks on our application for counsel fees, so you may have us back.

THE COURT: Oh no. In the personal sense I don't mind that at all. What I do mind is my continual bafflement at the post trial maneuvers here.

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That will be relatively simple; however, while you mention that, I do think, Mr. Powers, I would like an advance --

MR. COOPER: Your Honor, we served our papers yesterday on Mr. Powers and the Court, an affidavit of service. I assume your Honor would want to set it down for a hearing.

THE COURT: There has been a lag.

I will assure you you did. It didn't get to us. That's what Mr. Powers encountered with his papers.

MR. COOPER: I have an extra set here.

THE COURT: I would assume we should have a hearing, but I would like to give Mr. Powers a chance to look at this and then tell me what his dues are.

MR. POWERS: Their papers came in yesterday afternoon. I was going to plan answering papers on facts and law to submit to you and wait for you to tell me what you would like to do.

THE COURT: Did you hear that? He is going to submit answering papers of fact and law. Let's wait until we see his papers and then I will make it my duty to call both of you, and we will put it down for a hearing, or argument, or whatever is necessary.

MR. COOPER: Fine.

THE COURT: I must say that perhaps I deserve your

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response, Mr. Cooper, but I would say to you and Mr. Powers that my annoyance is not at the level you perform. I will tell you the truth:

I am not only amazed but I am titillated by some of your maneuvers, but my annoyance comes because of my continual bafflement as to what these details all amount to. That doesn't have anything much to do with the capabilities of Lawrence M. Powers and Burton Cooper. If I suggested otherwise, you each have an apology. I so apologize. Don't think that the fact that we have to go to the mat again on counsel fees is going to offend me or nauseate me. I am sure it will not. We will leave the thing go. Whenever your papers come in, I will read them over and then I will call, or my clerk will call, each of you.

(Time noted: 2:55 p. m.)

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MP

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

TITAN GROUP, INC., Plaintiff	:	
vs	:	72 Civ 1797
HAROLD FAGGEN, Defendant.	:	

New York, N. Y.

June 4, 1974 - 10:20 a.m.

Before

HON. HAROLD R. TYLER, JR.,

District Judge

APPEARANCES:

POWERS & GROSS, Esqs.,
Attorneys for Plaintiff
110 East 59th Street
New York, N. Y.
LAWRENCE M. POWERS, Esq., of Counsel

SCHEIB, SHATZKIN & COOPER, Esqs.,
Attorneys for Defendant
235 East 42nd Street
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BURTON S. COOPER, Esq., and
EDWARD LABATON, Esq., of Counsel

- - -

THE COURT: Well, gentlemen, we have the issue of counsel fees which Scheib, Shatzkin & Cooper are seeking, in the sum of $250,000 in this case.

I have your papers, Mr. Cooper. Is it the intention of your office on behalf of the defendant and yourselves to rest on the papers, or what is your intention?

MR. COOPER: Well, your Honor, first of all, before I say I rest on them, I have to correct something in those papers. There is an inaccuracy in my affidavit.

THE COURT: What page are you talking about?

MR. COOPER: It deals with the total number of hours spent, your Honor.

THE COURT: What page?

MR. COOPER: I am going to get it for you, your Honor.

Page 6, Paragraph 11.

THE COURT: Page 6, Paragraph 11, yes.

MR. COOPER: The correction that has to be made there, your Honor, is that there was instead of 2,100 hours spent between Mr. Labaton and myself, there was a total of 1,376 hours spent between Mr. Labaton and myself.

THE COURT: 1,376 hours?

MR. COOPER: Yes, your Honor.

THE COURT: Quite a difference.

MR. COOPER: Yes, sir; there is. I can explain it. The explanation for it, your Honor, that we had been on an IBM computer system of time records up until January of 1973, and when I instructed the clerk in the office to compute it, apparently they took off some monthly totals and added them to the daily results, so that they duplicated time.

I just wanted to correct that.

MR. POWERS: That changes the total, too, in the same paragraph.

MR. COOPER: Yes. I will give you a schedule, Mr. Powers.

Could I hand up to your Honor a schedule of time spent, to be annexed to that affidavit, in lieu of Paragraph 11?

THE COURT: Well, I don't know whether you want to put these in as an exhibit or whether you want to testify about it.

MR. COOPER: I will be glad to testify to it, your Honor.

THE COURT: Well, I think perhaps it might be wise if you do. You have given this affidavit, which says one thing, and now you are correcting it, which, of course, is your right and, indeed, your duty, but I think it ought to be done under oath so we know what we are doing here.

MR. COOPER: Yes, your Honor.

B U R T O N S . C O O P E R , being first duly sworn, testified as follows:

MR. POWERS: Your Honor, does this mean we are going to have a full-scale hearing right now on all the issues tendered by the two sets of papers? If so, I think I would like to make some brief opening remarks so the Court will know where I am going in my cross-examination.

THE COURT: I don't want to cut you off, Mr. Powers, but I am trying to deal with what I consider a rather marked change in the submissions by the firm seeking these fees, and I think it ought to be a matter of record, because we have a rather confusing picture.

If you want to ask any questions of Mr. Cooper while he is on the stand, I will permit that.

MR. POWERS: This is just to change the submission.

THE COURT: Yes, but I have to lean on counsel. I don't know what else is coming. We have to be patient here and see what happens. Let's go ahead.

MR. COOPER: Your Honor, I should like to offer as an exhibit on this hearing a schedule of the time spent by each of the persons who worked in my firm on this matter. I have handed a copy of this to Mr. Powers.

THE COURT: Can we have the Clerk mark this as Exhibit 1 for identification?

(Defendant's Exhibit 1 marked for identification.)

THE COURT: Was this list prepared under your supervision?

THE WITNESS: Yes; it was, your Honor.

THE COURT: And when was it prepared?

THE WITNESS: I prepared it within the last week.

THE COURT: Do you have any objection, Mr. Powers, to putting this in the record as Exhibit 1?

MR. POWERS: No.

THE COURT: All right. It will be received.

(Defendant's Exhibit 1 for identification was received in evidence.)

THE COURT: Now, if I could just ask you, Mr. Cooper and Mr. Labaton, at this point, so that Mr. Powers and I can anticipate what we are up to, is there anything else you would like to testify to on behalf of your submission or fees here or any other documents you would like to put in the record?

THE WITNESS: No. I have no other documents at this point, your Honor. I should like to give your Honor a brief summary of the work that was performed and the circumstances under which it was performed and to explain the total number of hours spent, and I have in brief stated in my affidavit but perhaps for the purpose, I think, of this Court it would be

of value to understand some of the hours that were spent in this matter.

THE COURT: Well, say whatever you want. I assume that a good deal of the time, the bulk of the time was spent in connection with this suit here in the Federal Court known as Titan versus Faggen.

THE WITNESS: All of the time was spent on that, your Honor.

THE COURT: And, more than that, it was spent on defending the Securities Act claims and related claims asserted by the Titan Group against Mr. Faggen.

THE WITNESS: Yes, your Honor.

THE COURT: All right. You go ahead and say whatever you care to.

THE WITNESS: Well, I just wanted to explain to your Honor that the time that was spent by Mr. Labaton and myself was spent in large part in preparing for the summary judgment motions which were made in this action, both the motion on behalf of the defendant and the cross motion made by the plaintiff, and in doing that there was a great deal of time spent in reviewing a voluminous number of different kinds of documents, minutes, corporate minutes, personal records of Mr. Faggen of meetings, various SEC filings, the annual reports and proxy statements of the plaintiff.

The preparation that went into the summary judgment motion was fundamentally essential to the later depositions that were conducted, and, indeed, the depositions were obviated in many respects by that summary judgment motion.

As your Honor knows, the summary judgment motion also carried with it a motion for a temporary mandatory injunction to compel the plaintiff to pay the current interest on the notes, and there was a considerable amount of time spent in the research so far as that aspect of the motion was concerned.

The depositions that were conducted were approximately two thousand pages in length of all the parties that were examined. I had, in addition to conducting the depositions, utilized all of the material that had been mobilized for the summary judgment motion to conduct these depositions.

The summary judgment motion I regarded as essential from the standpoint of the strategy of this case, in that early on in this case we were able to determine factually just what the contentions were going to be, and it ventilated for our purposes the various aspects of this claim in support of the 10(b)(5) action that was alleged here.

In addition to assisting greatly in the depositions, the mandatory injunction was essential for purposes of expediting the trial of this action.

As your Honor knows, we had appeared before Judge Ryan on that motion for temporary injunction, and Judge Ryan had directed an early trial of this case as a result of the application for a mandatory injunction, and, unfortunately, in that application, when Judge Ryan directed the early trial, he assigned it or sought to transfer it to Judge Levet, who declined it, and the case then stayed in a condition of what I might say was a suspended animation, in that we were neither getting our early trial nor were we assured any trial date.

This, of course, necessitated the appeal which followed and the ultimate direction of the Court of Appeals to set this case down for an early trial.

I might point out that when the appeal was taken and not until the appeal was taken and not until the answering briefs were served on the appeal was there any position taken by the plaintiff in which they supported the early trial, and it was only on the argument of the appeal that counsel for the plaintiff joined in the application for the early trial, which obviated the necessity for a decision by the Court of Appeals on our appeal.

Now, considerable work went into that appeal, and it was, I think, a vital and significantly essential part of the strategy of the defendant here to get these issues tried

quickly, and I think it served a very useful purpose in the ultimate disposition of this case.

Basically, your Honor, Mr. Labaton and I worked in conjunction with each other. As your Honor may be aware, Mr. Labaton has done a considerable amount of work in the securities field -- far more than I have done -- and I found that we had some novel questions of law in this case, on which his expertise was very useful.

I, of course, have tried a great number of cases in my experience, and in the preparation of this case, Mr. Labaton's work and my work together were, I think, evidenced by the fact that there was a presentation of facts here to your Honor during the trial which highlighted the various issues in this case, one of which your Honor pointed out was the interesting question of the statute of limitations and its application to this case.

Basically, that is the description of services except for one more thing:

Following the conclusion of the depositions, a great deal of time was spent in the office, some by me but mainly by one of our associates, Mr. Pfeffer, in interrelating, correlating and cross-indexing all of the depositions that were taken in this case.

I think fundamentally that explains the work that

was done, in broad outline.

MR. LABATON: If your Honor please, to complete our presentation, I think I would like to put to Mr. Cooper a couple of questions, which I think will supplement the affidavit.

THE COURT: Very well.

BY MR. LABATON:

Q Mr. Cooper, will you tell the Court what the hourly charge of the various lawyers who worked in the firm would be if this were a totally non-contingent matter?

A My billing time is one hundred dollars an hour. Mr. Labaton's time and Mr. Rudolph's time is eighty dollars an hour. Mr. Pfeffer's time is fifty dollars an hour, and that applies to the other gentlemen as well, Mr. Mauriello, Mr. Smith and Mr. Graf.

Q Was the fee of the firm based upon a time factor basis in this case?

A No; it was not.

Q What was the basis?

A It was a contingent fee basis.

Q And what was the contingency?

A Fifteen per cent of the sums recovered.

MR. POWERS: I couldn't hear that.

THE WITNESS: Fifteen per cent of the sums recovered.

THE COURT: You compute that to be fifteen per cent of one amount?

MR. LABATON: Six million --

THE WITNESS: $6,400,000, your Honor.

MR. LABATON: That's right. That was the total.

THE COURT: This was your arrangement with your client?

MR. LABATON: That's right.

MR. COOPER: Yes, sir.

MR. LABATON: No further questions.

THE COURT: Mr. Cooper, I take it you would agree that nowhere in your affidavit or anywhere else do we have a breakdown of how this time was spent by the various lawyers.

MR. COOPER: Yes, your Honor.

THE COURT: We just don't have any information on that; is that correct?

MR. COOPER: That's correct.

THE COURT: Is that because you don't have any time sheets?

MR. LABATON: No, your Honor. Up until January of '73, as Mr. Cooper indicated, the time records that were kept were transcribed on weekly cards, which were then sent to a data processing company.

The only records that were then maintained after

those cards were shipped out were the time -- were the name of the lawyer, the week the service was performed, because it was done on a weekly basis, the amount of time and the client and the case number.

We didn't have a breakdown of the services that were rendered up until then.

In addition, as Mr. Cooper pointed out, if work was done in connection with the motion for summary judgment in May and June and July of 1973, much of that work was later used in connection with the pre-trial preparation itself. For example, we had to -- In the motion for summary judgment, it was at that stage that we did our primary analysis of the law relating to 10(b)(5), because it changes every day, as your Honor well knows, but at least the basic research was done at that time.

It was at that time that we read all of the contract documents, the correspondence, the corporate minutes, the case reports, the proxy statements, the several thousand pages of documents and pages that had to be read in the case.

So our services were essentially performed in that sense in connection with the motion for summary judgment, but it had to be done also in connection with the trial of the case also, and we found it impossible to break down for that

reason, also.

We do have from teh point of January on individual time sheets which would break down for each day the services that were rendered, that is, each lawyer kept individual time sheets which were maintained in a single file, put together in a single file, but what we were able to do -- the only meaningful thing we could do is break it down in blocks of time, that is, essentially everything from December '73 to March '74 was in connection with the preparation for trial and the trial itself.

At the early stage, from May of '72 up through November '72, with the exception of the settlement discussions, which took considerable time, related to the motions that Mr. Cooper described, and almost everything in '73 up through November was related to the depositions, preparation for depositions and the taking of the depositions themselves.

Those, in broad outline, can give your Honor some idea of the time, and if your Honor wanted, we could, by letter, supplement this schedule and break down those in perhaps slightly more, but not a great deal more detail than what I have just described.

THE COURT: All right.

Now, Mr. Powers, do you want to cross-examine on

this?

MR. POWERS: Yes. Before I do that, I would like to make a couple of general remarks as to where I am going before I actually question the witness on this, so that the Court can perceive the point I am trying to bring out when I question.

Your Honor, I don't know if you have had a chance to read my affidavit.

THE COURT: I have read it -- twice.

MR. POWERS: Thank you. I knew it got to you late, because I found it in the files last week, when I was looking for --

THE COURT: It came up last week. I have had it since. It was received on the 30th of May in my chambers.

MR. POWERS: Your Honor flagged the first point here, in that this is a recovery by litigant Faggen for his own account on the notes collection provision, and that is a very limited collection provision. It says that --

THE COURT: I know what it says. You quoted it in your affidavit. The eighth covenant, we will call it, or the eighth paragraph.

MR. POWERS: Yes. I think that means that any efforts of counsel for Mr. Fink for which Mr. Faggen had to compensate his counsel not related to the collection of

notes are not related to Mr. Fink on this application, and the Court is well aware that whatever contingent fee arrangements he chose to make with his counsel are irrelevant here. The only relevant thing is what is allowable under the Tartel decision --

THE COURT: You don't have to argue this now. I was the judge in Tartel. You don't have to tell me about Tartel. I suggest that you get to your point as to what you want to ask Mr. Burton S. Cooper.

MR. POWERS: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. POWERS:

Q Now, Mr. Cooper, in your time sheet that you supplied here, can you point out to the Court the amount of time that was spent in advising Mr. Faggen on his employment relationship to Titan and his discharge? Can you isolate that time in your schedule here?

A I cannot, and I don't think I have ever billed for it.

Q Well --

A I mean, this time does not include that.

Q Well, you were not billing for any time for Mr. Faggen, were you, Mr. Cooper?

A No. I shouldn't put it that way. Perhaps I misspoke. What I meant to say was that I have no time down

here which reflects time spent dealing with his employment per se.

Q Well, I take you back to the spring of 1972, after this action was started. You recall that Mr. Faggen was discharged temporarily at that time; is that correct?

A I dont' believe he was discharged.

Q He was on a consulting basis?

A His status was converted from an employee purportedly to one of a consultant, although that never really occurred, as I recall.

Q Do you recall that a series of telegrams was sent to Titan Actuarial by a number of its clients saying that unless Mr. Faggen and Mrs. Faggen were re-hired, they would terminate their relationship with Titan Actuarial? Do you recall that in June of 1972?

A Well, let me answer your question this way, Mr. Powers. I don't recall the specific language of those telegrams. I do recall what I think you are driving at, which is that there were telegrams sent protesting the change of status of Mr. Faggen from what it had been to what was apparently going to be taking place.

Q And you had a lot of consultations with Mr. Faggen on that subject at that time, didn't you?

A Well, I don't know how you characterize "a lot". I

would suppose I spent with him perhaps four or five hours.

Q Is it your testimony that you didn't put those down in your office time records?

A Yes.

Q You just didn't put down time talking to the client about his consulting relationship?

A No; I did not.

Q And how did you go about putting down the time when he switched to litigation questions?

A I only recorded the litigation time.

Q Do you have any notes or memoranda from your office files which would indicate that breakdown?

A You mean, how I aaccounted for my time?

Q Yes.

A I have my office diary, in which I kept my time. In other words, I would put down how I kept my time, Titan, Faggen, summary judgment motion, Titan, things like that.

Q Do you have that diary presently?

A Yes.

Q While Mr. Labaton is getting that out, do you recall advising Mr. Faggen in connection with his starting a new business at the conclusion of the non-compete period of his employment contract with Titan Actuarial?

A Well, I didn't advise him as to starting a new business, Mr. Powers. The advice I gave him, again to try to anticipate your question a little bit and to try and move this along -- I advised him as to what the contract required and what the meaning of that contract was with respect to what work he could do.

Q And did you note that time on your time records?

A No; I did not.

Q Is it your testimony, Mr. Cooper, that you had an agreement with Mr. Faggen that you wouldn't charge him for any time in advising him how to comply or not comply with his employment agreement?

A No. That is not my agreement -- that is not at all -- that is not my testimony at all.

Q Did you ever discuss this with Mr. Faggen?

A Yes; I did.

Q That you were not putting any of your time down on these consultations?

A No.

Q Did you have consultations with Mr. Faggen before he left, when Titan discharged him, at the end of 1972?

A In what context?

Q Well, who was the gentleman from your office who went down to Titan Actuarial's office and left with a group

of Mr. Faggen's files?

A Mr. Smith.

Q Mr. Smith?

A Yes.

Q Is that Mr. Smith's time that is on here, four and a half hours?

A Yes.

Q And that was time Mr. Smith spent getting Mr. Faggen's files for him from Titan's offices, wasn't it?

A No. If you will recall, Mr. Powers, Mr. Faggen was discharged in January of 1973, and there is no time billed for Mr. Smith in that period.

Q Did you have consultations with Mr. Faggen on his discharge at that time?

A In connection with the proposed motion -- or not the proposed butthe actual motion which we made after the Judge's decision and the discharge.

If I recall, Mr. Powers, Judge Ryan decided this motion about January 14th of 1973, and on January 26th, Mr. Faggen was discharged, and on February 8th we moved by order to show cause for a rehearing on the denial of the temporary injunction motion.

Q Now, is it your testimony that you didn't put down any of this time, either, conferring with Mr. Faggen on his

discharge and getting his files?

A No. That's not so. I did confer in connection with the motion which was made for the purpose of rehearing.

Q And did you also note down time on advising Mr. Faggen on his pension and welfare plan rights and his vacation plan rights?

A There is no time recorded for that, no.

Q Did you record the time that you advised Mrs. Faggen on her vacation and pension plan rights?

A No; I did not.

Q When did you bring that lawsuit in their behalf in the State Court regarding those rights?

A I believe that was brought some time in March or April of 1973.

Q I see. And is it your testimony that none of that time was noted on your time records?

A It is not.

Q It was just part of the package deal that you had with Mr. Faggen; is that right?

A I didn't --

MR. LABATON: Objection to the form of the question.

Q What are the fee arrangements?

THE COURT: Wait a minute. The package deal with Mr. Faggen? I don't understand that. Rephrase it.

Q What are your fee arrangements in representing Mr. Faggen with respect to his employment rights against Titan?

A At the time that that matter came up, I discussed with Mr. Faggen the fact that this was a separate lawsuit, that it would not be covered by the retainer agreement signed in connection with this lawsuit, and I said, "Do you want to work out a fee on that now?"

Well --

MR. COOPER: Your Honor, I am a little bit disadvantaged here, because I don't know what part of this may be privileged as regards the other lawsuit, as to discussions had with the client regarding fee.

THE COURT: Well, can't you avoid that by simply explaining what your fee arrangements were with respect to this and telling us also simply whether or not you had separate fee arrangements with certain other matters and just generally describe them? Wouldn't that do it, Mr. Powers?

MR. POWERS: Yes, sir.

A (Continuing) The fee arrangements with respect to all work not contemplated by the litigation was a matter in which Mr. Faggen and I agreed would be separately dealt with. We did not sign any separate fee arrangements.

Q Has he paid you any fees for any of the consultations you had on his employment relationship, either in the

summer of 1972, the end of 1973 or since that point?

A No.

Q Has he paid you any fees in connection with your investigating and commencing this lawsuit for pension and vacation plan rights on behalf of him and Mrs. Faggen?

A No.

Q And has he paid you any fees in connection with any of the motion practice that you have engaged in in that case?

A In the State Court?

Q Yes.

A No.

Q Do you have your retainer agreement with Mr. Faggen handy?

A No.

Q May I see it?

A I don't have it with me, no.

Q Did he pay you on a cash retainer?

A No.

Q It was entirely on a contingent basis?

A Yes.

Q Do you plan to make separate charges to him for your activities in these other cases?

A Absolutely.

Q Have you sent him a bill on that yet?

A No; I have not.

Q Now, I think you mentioned that your appeal, which was an attempt to compel an early trial, was a successful appeal. Was that your testimpny?

A I think so. I think so.

Q Successful?

A In my judgment it was successful.

Q Do you recall that Judge Ryan's order was affirmed by the Second Circuit?

MR. LABATON: I object to the form of the question, your Honor. What happened speaks for itself, and Mr. Cooper has testified to the reasons why he thought it was successful.

THE COURT: Well, that doesn't mean -- I think the record is clear what happened in the Court of Appeals -- I agree, Mr. Labaton -- but I think Mr. Powers is entitled to ask him about this.

A Mr. Powers, I can answer your question by simply stating: yes, it was affirmed. I think more than that is required, though, for the answer.

Q Well, I am satisfied with that answer.

A All right.

Q Mr. Cooper, do you recall at pages 7 and 41 of the brief that Titan submitted to the Court of Appeals, it is

asking for an early trial and indicating it would join in an application to Judge Ryan to have an early trial, now that Judge Levet sent the case back?

A I believe I so testified.

Q You saw that in our brief before the case was argued?

A Absolutely.

Q So when we joined in your application for an early trial at the argument, that was supplementary to having joined with it on the brief before we even got to the Court of Appeals, isn't it?

A I have to say it was supplementary, or it was in accord with what you said, yes.

Q Now, Mr. Cooper, as you look down your list here of hours, your own hours, 853 of them, could you tell the Court how many of those hours in your estimation were spent first on the application for alternative relief in the first motion for summary judgment? The application for alternative relief I am referring to, if you want to look inyour working volume, Mr. Cooper, is that there was a ten-page affidavit filed by Harold Faggen seeking summary judgment.

Now, the last three pages of that affidavit seek mandatory payments of interest. Can you tell us, during the period May/June of '72, when you prepared those motion

papers, how many of the 85 hours that are shown for those two months related to the alternative relief prayer which occupies three pages of the ten-page affidavit?

Will you give us a rough guess?

MR. LABATON: I object to the question, your Honor.

THE COURT: No. I am going to overrule that objection.

A I would say that of the time spent on the temporary injunction from a factual basis, as distinguished from the research on the law, that out of the 85 hours, perhaps five or six hours were spent on that part of the motion.

Q All right.

A Factually.

MR. LABATON: Are you finished?

Q Now, there are a hundred --

A I said there are two parts of that.

Q Excuse me. Go ahead.

A One was the factual basis, and the other was the legal research basis.

Q Right.

A Now, of the eighty-five hours on the legal research, I would say that certainly fifteen to twenty hours were spent on the legal research portion of the mandatory injunction.

Q Would it be fair to say, just adding up the two

numbers you gave us, that roughly twenty per cent of the first two months of work you spent on this case were spent on the application for mandatory interest payments?

What I did, Mr. Cooper, is add the five hours to the fourteen or fifteen hours.

A I understand. I would say that's what the numbers break down to.

Q And would that roughly twenty per cent figure be equally applicable to Mr. Labaton's 135 hours?

A Probably not.

Q How would Mr. Labaton's hours break down?

A Well, he spent a great deal of his time in the -- my recollection is that he spent a great deal of time on the 10(b)(5) aspect of it, the research on it. I would say that he would have spent a minimal amount of time, perhaps ten hours of his time would have been spent on the temporary injunction part of it.

Q Now, Mr. Cooper, the next time you came to grips with the temporary injunction issue was when Mr. Faggen was discharged at the end of 1972; isn't that right, when you made a motion for a reharing?

A Well, by "come to grips with it", you mean where we were faced with the necessity of doing something else again?

Q Yes. In trying to get mandatory interest.

A Yes.

Q So that if you looked at your time, say, in January and February and March and April of 1973, that would be the block of time devoted to that motion for rehearing before Judge Ryan; would that be correct?

A I don't think so, Mr. Powers. I think, if I could refresh my recollection, I think by then we were beginning depositions. I don't believe that there was any substantial amount of time spent in the period of January -- Well, let me do it this way:

The motion for rehearing occurred at the end of January of '73. I don't believe that there was a supplementary memorandum of law submitted to Judge Ryan. I think it was simply the affidavits. And then I believe we began to undertake the depositions of Mr. Kaufman and perhaps Mr. Frankel in the period February, March and April of '73, and I think that may explain some of the time that --

Q All right. So that your motion for a rehearing before Judge Ryan occupied pretty much nominal time on that point, because you submitted merely an affidavit without another memo of law; is that right?

A Well, when you say "nominal", I think we spent a lot of time in the latter part of January drafting those papers, and since we were doing them by order to show cause,

they were done under considerable time pressure.

Q Now, the papers: would that be the Harold Faggen affidavit at page 534 of the volume, and is that not a three-page affidavit?

A I will accept your statement, Mr. Powers.

Q It's a three-page affidavit that you put in?

A Yes.

Q And you put in a reply affidavit of another ten pages; didn't you?

A Yes.

Q And the reply affidavit --

A For the record, I think so.

Q And the reply affidavit didn't deal so much with the issue as opposing Mr. Frankel's application to amend his pleadings, did it? Do you want to look at that and refresh your recollection?

A I will accept that statement.

Q So that would it be fair to say that you put in about four or five pages of affidavit material on the application for a reharing on the motion to compel interest?

A If that's what the record is, that's what the record is.

Q All right. Now, I am trying to proceed with you, sir, in chronological order through your time sheets. At

that point you say you started depositions with me; is that right?

A I believe so -- I --

Q Now, the deposition of Kaufman was a lengthy deposition, as I recall -- two full days and a half day, wasn't it?

A I don't recall the days offhand. I think it was something like that.

Q Something like that. At any point in that deposition, did you make any inquiries of Kaufman with respect to Titan's duty to pay interest on the notes?

A You are speaking now of during the pendency of the litigation? I don't understand your question.

Q Well, isn't it a fact that your entire deposition of Mr. Kaufman related to facts involved with the 10(b)(5) claim in this case?

A I would say that essentially it dealt with the facts -- Let me put it a little differently than your question, Mr. Powers:

I think that my deposition of Mr. Kaufman, the genesis and the direction which it wook was developed out of the affidavit which Mr. Kaufman had submitted.

Q And those were all 10(b)(5) issues he was dealing with?

A They were dealing with the allegations of the background of the transaction, his relationship to the company. They weren't only 10(b)(5) involved in that, Mr. Powers. There were substantial questions of credibility that we were going into on that deposition.

Q Yes, but in relation to the 10(b)(5) claims of Titan, would that be correct?

A Well, do I understand that you are trying to do by your question now, to find out whether I was interested in examining Mr. Kaufman in relation to the -- to the requirements and the obligations created by the notes as distinguished from the way the transaction arose? Is that what you are trying to do?

Q I am not being questioned yet, Mr. Cooper.

A No. I don't understand your question, Mr. Powers.

Q Now, Mr. Cooper, if you recall reading my affidavit, I added up the number of deposition days as being roughly thirteen full working days, taking a six-hour working day. Is that an accurate summary?

A If you give me that as the figure, I will accept it, Mr. Powers.

Q Could you state to the Court how much of that thirteen deposition days in that court was spent relating to issues of collecting interest for Mr. Faggen on his notes?

MR. LABATON: If your Honor please, I think we can cut this short in one respect by a concession that virtually no time was required on our part except in the very first meeting to assert the claim directly on the note, except to the extent that we had to defend against the 10(b)(5) claim brought by Mr. Powers in order to collect the note.

If he wants to go through with this witness through each phase to determine that we didn't have to prove the essential elements of the note, that it was signed and that there was no payment, I think that it is just a waste of the Court's time and everybody else's time.

MR. POWERS: I appreciate that concession, and could we stipulate, Mr. Labaton, that all of the thirteen deposition days in this case were spent on work relating to Titan's Rule (0(b)(5) claims and were not connected with actual collection of interest or pcincipal as such?

MR. LABATON: I would not concede that in its entirety, because defending against 10(b)(5) claims was directly in connection with the collection of principal and interest. We couldn't collect the principal and interest until we defeated that claim.

But the Court understands; you understand; we understand.

THE COURT: I think that's correct. Let's go on.

THE COURT: I think one other thing ought to be stated, Mr. Powers, in that your examination of Mr. Faggen I think in some aspects dealt with the interest part of it and his need for funds. I can't tell you how much time was spent specifically on it, but I think a portion of his deposition was taken up with that.

Q How long has Sheldon Rudolph been practicing law?

A Well, I think he's been practicing law for seventeen years.

Q Was he present at the trial?

A I believe he was. He may have come in for a short period, but otherwise I don't believe he was.

Q How long has Joel Pfeffer been out of law school?

A About five years.

Q Was he present at the trial?

A Yes. He came to the trial several days.

Q Did he supply any questions to you at the trial?

A No;he did not.

Q How long is Allen Graf out of law school?

A About twenty years.

Q Did he participate in the trial in any way?

A No.

Q Were any of these individuals on your list in any of the depositions with the exception of Mr. Labaton?

A No; I don't believe so. Mr. Mauriello was. I'm sorry. Mr. Mauriello was at some deposition. I don't recall whcih one.

Q One deposition?

A I believe so, yes.

Q And Mr. Labaton didn't attend all the depositions either, did he?

A No; he did not.

Q Did he appear at more than one or two?

A Well, let's see. I believe he appeared at three and helped in the preparation of two others.

Q He never asked any questions, did he?

A Not audibly.

Q In fact, none of the lawyers on your list other than yourself ever asked a single question at any phase of these cases?

A That's correct.

Q Did they?

A That's correct.

Q Is that correct?

A That's correct.

MR. POWERS. Your Honor, could I have about a two-minute recess to look through these time sheets that he just handed me, before I resume?

THE COURT: Surely.

MR. POWERS: Thank you.

THE COURT: But as a matter of curiosity, what are these time sheets, because, as I understood, we didn't have any time sheets available.

MR. POWERS: I don't know. That's why I want to look at them.

MR. COOPER: Your Honor, that's my office diary on which I recorded my time.

THE COURT: These are your personal notations?

MR. COOPER: Yes.

THE COURT: All right.

MR. LABATON: And from January '73 we have these time sheets, your Honor. We do them as I indicated.

THE COURT: All right. We will take a short recess.

(Recess.)

MR. POWERS: May I continue, your Honor?

THE COURT: Please do.

Q Mr. Cooper, now, these sheets that you have handed to me: these are your daily calendars for part of the period embraced by this case; is that right?

A Yes.

Q They are not really time sheets?

A No.

Q They are just a list of calendar events, where you were and what you were doing during the period; is that right?

A Well, more than that. It's also of a calendar broken down by hours of the day.

Q Right. Now, in June of 1972, you spent a substantial amount of time visiting me, didn't you, working on settlement negotiations and papers in this case?

A I spent time. I don't remember how much.

Q Well, would it be fair to say that, for instance, on June 5, 1972, that you were involved with me -- Excuse me -- On June 6, 1972, you were involved with me most of the time and also the day before, according to your calendar, in settlement discussions?

A June 6th; is that your question?

Q Yes. Do you remember those meetings that went on?

A Yes. I certainly do.

Q And Monday, June 19th. "Powers office, Faggen".

A Yes.

Q And it goes on for several days in June and July, doesn't it?

A Yes. Please don't mix up the pages.

Q And Mr. Labaton used to come up to all those meet-

ings with you, didn't he?

A I don't think he came to all of them.

Q He came to most of them, didn't he?

A Offhand, I don't recall how many he came to.

Q And included in your time during that period you had lengthy meetings with Mr. Faggen and Mr. Allen Aronson on the settlement problems?

A Yes.

Q And the settlement involved some issuance of stock to Mr. Faggen, about a million dollars in cash and some new notes of Titan; is that correct?

A Among other things, yes.

Q And there was extensive drafting on those papers during that period, too, wasn't there?

A Well --

Q Do you recall how many drafts we went through?

A I don't recall, but I would say this, Mr. Powers, without characterizing it as extensive or not extensive, there was work done during that period, and there were drafts of agreements made, yes.

Q And would it be fair to say that during that period in June and July of '72, that all work on the litigation itself was suspended; you had served your motion papers towards the end of May of early in June, and for the next two

months the parties were working on settlement trading and settlement papers? Would that be a fair statement?

A I wouldn't say it was two months, but let's see if the answer would be precise. It was after the motion papers were submitted.

Q No. After the motion papers were served.

A By me?

Q Yes.

A You had not served any papers.

Q Right.

A And after -- or let's do it this way: After I served you with your set of motion papers together with the memoranda, negotiations leading towards a possible settlement began. I did not receive answering papers from you until negotiations broke down.

Q Now, would it be fair to say that you served those papers on or about June 7th, because that's the date that Harold Faggen's affidavit is sworn to?

A Well --

Q Would that be a fair dating of when the litigation effort in the case stopped temporarily?

A I would say that somewhere in that week, probably.

Q All right. And would it be fair, then, that all of the time that you show and all of the time that Mr.

Labaton shows after June 7th and through June and through July on your summary, is time spent in horse trading, tax problems and settlement papers?

A No; I wouldn't say it was spent on that.

Q Well, what do you say it was spent on?

A Well, there was still a continuing investigation. If you recall, Mr. Powers, that -- Well, at the initial meetings that we had, there was a very strong prospect that the case would not be settled. There was a very definite period that I recall when the motion for temporary injunction was uppermost in our minds and where we insisted upon the payment of interest, at least, pending the final determination as to whether or not we would or would not settle.

Now, I can't tell you specifically when we got down to terms, but I do recall that it was probably not until the end of June that we got down to terms, and during the month of June we were still working as though we had a case to proceed with.

Q Even though you were visiting at my office, say, on all these days in June which I now show you, "Powers Office"?

A I assume that those days were days in which we were conducting negotiations, which only fortifies my feeling that I expressed a moment ago, that we were not getting anywhere, basically, in resolving that problem.

As I recall, you had employed a tax consultant, and there was a great deal of time spent by you in discussing with me what the tax consequences of this might be.

Q To Mr. Faggen?

A To Mr. Faggen.

Q Right.

A And so when you say that I wasn't spenting any time on any other part of the litigation during that period, I wouldn't say that that's accurate.

THE COURT: Mr. Cooper and Mr. Powers, forgive me for interrupting, but, Mr. Cooper, on page 5 of your affidavit, you list the depositions and the dates. Unfortunately, you don't put the year. I assume it's 1973.

MR. COOPER: Yes, your Honor.

MR. LABATON: They are all '73.

MR. COOPER: Yes; they are all 1973.

THE COURT: All right.

Q Mr. Cooper --

MR. COOPER: Wait a minute. Is the Judge finished?

MR. POWERS: I thought your Honor was finished.

THE COURT: Is there anything else you want to go into?

MR. POWERS: Just one thing more, and I will be finished.

THE COURT: All right.

Q Mr. Cooper, would it be fair to say that out of the two hundred hours that you show for yourself and Mr. Labaton in June and July of 1972, about seventy-five per cent of that time was spent on the settlement negotiations, drawing papers, getting tax advice and otherwise dealing with termination of the fraud case and making a new deal for Mr. Faggen?

A I don't know that I would give you that kind of a percentage, Mr. Powers. I would say that it would probably be in the area, on my part, of about fifty per cent of the time, and in Mr. Labaton's part perhaps twenty per cent of the time.

Q Well, Mr. Labaton was at virtually all of the meetings, wasn't he?

A No, no. As a matter of fact, Mr. Labaton was at virtually none of the meetings. He was at about two or three of them.

MR. POWERS: Your Honor, I have no further questions of Mr. Cooper, and I can complete -- Excuse me -- I may have another question. I have a final observation.

MR. LABATON: I have two or three questions, your Honor, on redirect.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. LABATON:

Q Mr. Powers asked you a question concerning the successfulness of the appeal. In what respect was the appeal to the Court of Appeals successful, in your judgment?

A Well, we couldn't get a trial. Judge Ryan, while he directed the early trial, there was no way to get Judge Ryan to move the case to an early trial.

As a matter of fact, specifically, at one of our hearings, I had asked Judge Ryan about the question of when we were going to get the case tried. I believe it was the hearing at which he closed down on the date for discovery, and I think that came some time in the argument on the motion in '73, and he said very quickly, "There's no way to tell when you are going to get a trial in this cse." That was the end of that.

So that it was necessary, in order to do something about that, to take the appeal. Mr. Powers' comment about joining on the appeal -- the joinder was a belated joinder. Never before during the course of the case did he say he wanted an early trial.

Q There was some question regarding the number of lawyers who worked on this case. Based upon your experience in this case and in other litigation, you say there was --

that the efforts of all the lawyers who worked on the case were necessary in the prosecution and defense of the action?

A Absolutely.

Q Mr. Cooper, do you know of any respect in which the summary which has been marked Exhibit 1 today is incomplete?

A Well, I am certain that there are many, many hours that were spent that are not recorded. I can't account for which they were, but, for example, I do know that you were present during the deposition of Mr. Kaufman, and yet you have no time recorded for the presence at Mr. Kaufman's deposition.

I do recall that you were present at Mr. Frankel's deposition, and there is no time recorded for your presence at that deposition. And there are probably other examples of the same kind.

Actually, I can't give you any other specifics.

MR. LABADON: No further questions.

THE COURT: Thank you, Mr. Cooper.

(Witness excused.)

MR. POWERS: Your Honor, can I make a couple of brief observations?

THE COURT: Well, before you do, could we ascertain once more whether or not there is anything that counsel for Mr. Faggen wish to submit?

MR. LABATON: If your Honor please, there was marked as an exhibit the promissory note in the trial. I don't know whether your Honor has that. I would like to give you another copy, your Honor, and I draw your particular attention to the bottom of page 3, just above Paragraph 2.

THE COURT: Well, let's deem this an exhibit in this hearing. Is it Defendant's Exhibit 2?

MR. LABATON: Three, I think.

THE CLERK: Two.

MR. POWERS: Could I look at this?

(Defendant's Exhibit 2 deemed received in evidence.)

MR. LABATON: I draw your Honor's attention to the language on page 3, just above Paragraph 2, which gave Mr. Faggen the right to pursue not only on his own behalf but on behalf of any other holder of the note on default.

THE COURT: Well, I am sorry, Mr. Labaton, I don't --

MR. LABATON: Just above Paragraph 2, your Honor, the last phrase. "In the event of the default, at the option of the holder of any note in a series of which this note forms a part" -- I bring that to your Honor's attention in connection with Mr. Powers' argument that because some of the notes were pledged --

THE COURT: Well, I see. I am going to have a

few words with him on that. He has undermined his best argument by going into that. In an effort to have his cake and eat it, too, he has undermined his best argument. Fortunately, I am going to not hold it against him. But that is an idiotic argument from his selfish point of view. He made the real point here this morning.

We are not bound, in this proceeding, by any fee arrangement that Faggen may have made with his counsel, and it is sort of ridiculous, knowing that, to say, "Well, the notes were not quite as valuable as the recovery", or something of that kind.

But believe me, I assure you, Mr. Powers, fortunately I am going to overlook all that nonsense, because you have something far more serious to say than that.

MR. LABATON: Your Honor, the only reason --

THE COURT: Let's get this done.

Now, are you anxious to submit anything else from the point of view of Faggen?

MR. LABATON: I am neither anxious nor in any other way compelled to.

THE COURT: All right. Now, Mr. Powers, it is your turn.

MR. POWERS: Just a couple of brief points.

Because of the contingent fee arrangement that Mr. Cooper's office had here, they were entitled to a fee of fifteen per cent even on the two and a half million, which was never in dispute in the case, which was conceded by Titan as the fair value in notes to be paid to the Faggen companies, and I think this is one reason why they put seven people on the case, and taking their time records at face value as amended that you have, I think, a hugely excessive amount of time here, because they have the incentive in a $375,000 assured fee to begin with, and from then on it was a productive professional venture by counsel to keep going and to spend whatever time was necessary to properly raise the ante.

If Mr. Faggen had been subjected to the discipline of reasonable time basis charges, as most clients are, in the process of a difficult litigation, I suspect that the amount of time which went unbilled would be very, very great and that the amount of time which was spent would be substantially less, because the client would complain that "You fellows are just spending too much time reading depositions over and over and checking this and checking that."

THE COURT: Again, Mr. Powers, what you are saying is what you have already said.

First of all, the Court, given a covenant like

this and a note, is not called upon to decide what might be paid in a private retainer agreement. I accept that you are quite right about that. That's an important point. I don't know why you have to argue that one again.

MR. POWERS: I am not, your Honor. I have finished.

THE COURT: Now, the point I would like to know from you: is there any -- I assume there is not -- factual information other than what we already have that you would like to offer?

MR. POWERS: No, your Honor. I think the record is adequate for my purposes.

THE COURT: Now, look: your points really come down to this: that first of all we are certainly not bound by any private fee or retainer arrangements which Mr. Cooper's firm has made with Mr. Faggen. Second of all, that it's got to be reasonable in relation to what was involved here. Third of all, I think you would argue that somehow this Court has got to view the 10(b)(5) claims or the fraud and the inducement claims, as I would think more accurately describing what was going on, except for our Federal jurisdiction jargon, which is about all it is, really, in terms of practicalities.

Is it your position that somehow everything that Mr. Cooper's office did in defending against that is to be

ignored? I don't think you quite say that.

MR. POWERS: Well --

THE COURT: Because you end up suggesting that $35,000 would be a reasonable fee.

MR. POWERS: My motive for suggesting that, your Honor, is because the Court has given a great deal of time to counsel throughout their case, and it is incumbent upon me to bring things to an end by some rough-and-ready standard at the last day of our visiting together these past six months.

So I tried to find some rationalewhich is swallowable by me as a lawyer in trying to make peace.

THE COURT: All right. I accept that. I wish this concern for all that you say you have had been exhibited earlier, and you do, too.

All right. I understand that.

MR. POWERS: Finally --

THE COURT: But the answer is, you are not taking a rigid, compartmentalized approach to this. You are pushing the idea that we have got to be reasonable.

We have got to assess what was going on, and we can't do something that would penalize Titan's clear right, which you and I have discussed before in another context, to come to a Federal Court and assert a Federal claim.

MR. POWERS: Exactly. It is exactly as you state it in Tartel, except there is a much narrower clause here. Normally, these collection costs appear in the clauses themsolves, or if it is bank boilerplate it is what you have in Tartel, where anything in dispute in the relationship means you are bringing these people into court on the basis of what you are fighting.

But it is not an acquisition contract as in the Litton Industries case, which I cited. It is only in the note, and it is only for activity definitely connected with the collection of the note, and there is no question that there was a reasonable amount of activity in this case directed at the collection of the note, but I have tried to narrow down the issue by supplying facts on where we were and what the real disputes were, and I can't add very much to my affidavit.

THE COURT: Well, I must say that you are quite correct, as I see it, that Paragraph or Covenant Number 8 is a far different piece of draftsmanship than was that found, for example, in the Tartel versus Chelsea Bank case. I am sure Mr. Cooper would agree that they are different. But you are not arguing the language of the clause or covenant in Paragraph 8 of the note here excludes any kind of fee to the Cooper firm at all under the circumstances of our case.

You can't be arguing that, because you end up suggesting a fee.

MR. POWERS: No; I am not. There were hours spent trying to collect on the amount of notes that were in dispute.

I also would like to point to this: there is indemnification to Mr. Faggen. We are not paying Mr. Cooper.

THE COURT: That's right. You are correct about that. Mr. Cooper cannot dispute that. We are really talking here about a further or supplemental judgment in favor of Harold Faggen.

MR. POWERS: And as indemnification, it is subject tothe tight standards you have, surety contracts, insurance contracts, and then I cited the Litton case, where you had a very broad indemnification proposition.

I think the Court sees what I am driving at here.

THE COURT: All right. Let me hear from you, Mr. Labaton, or do you want to --

MR. COOPER: Mr. Labaton.

THE COURT: Look, Mr. Labaton: I am sure you know -- you and Lawrence Powers have done this arithmetic, too -- but if we take your adjusted figure, that is, the figures which you and Mr. Cooper have corrected here this morning, and we basically work with Plaintiff's Exhibit 1, we are really dealing with 1,899 hours, in round numbers, and taking

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the normal rates of billing which Mr. Cooper testified to here, I compute that if you were charging this fee to a normal client at your normal rates, you would charge only $149,770.

MR. LABATON: If we had taken the case on a straight-time basis. That's quite correct.

THE COURT: Right. And also, as has been pointed out, if we were to accept the contingent fee arrangement which you apparently have, or your office has, with Mr. Faggen, you would be receiving fifteen per cent of $6.4 million, which would amount to about --

MR. LABATON: About $900,000, your Honor.

THE COURT: All right. Now, those, of course, cannot be the standards with which we precisely tried to solve our problem here. I am sure you agree to that as well as Mr. Powers.

MR. LABATON: I agree, subject only to one suggestion, your Honor:

While your Honor is quite correct about this Court not at all being bound by the arrangement that we had with Mr. Faggen, there is a standard applied in the Grinnell case which we tried to outline, which would take into consideration -- while not being bound by it -- take into consideration that arrangement to the extent that one of the

criteria in the Grinnell case is what a reasonable charge for counsel would be from a victorious plaintiff, and in measuring that, the Court might look at what in fact the parties agreed to.

THE COURT: Yes, but you see, Grinnell, as important a case as it is, really isn't quite precisely the same kind of case we have here.

MR. LABATON: I agree, your Honor.

THE COURT: As far as I know, it's very rare that a Federal Court is called upon to fix fees, except in bankruptcy and Chapter X cases and in derivative cases and in class actions. The other kind of situations in Federal law, where lawyers' fees are allowed at all, are extremely few. We all know that.

In fact, as your own research has cast up, Tartel happens to be one of the few cases even in a busy court like this where we have had a consideration of a covenant or note provision such as we have had here and that is present in the Regulation U case which was involved in Tartel.

Now, let me ask you this: A great deal of discussion has been had here and at all times about a motion for injunction, a mandatory injunction before Judge Ryan, the problems of having the case tried when Judge Ryan was unable to do it for, as it turned out, medical reasons, other reasons,

and Judge Levet was unwilling to take the case after Judge Ryan arranged it with him.

And then the appeal -- that's a difficult thing. It's all part of the vicissitudes of litigation, I am sure, but I wonder, should Titan be charged for that entirely.

MR. LABATON: Well, as your Honor stated, if we had had a meter running we would charge the client for that. It was part of the litigation in connection with the note. Much of the work that went into those things can't be severed from the work that was later done in the case.

You know, I guess you can draw fine lines, but when you are trying to handle a case as complex and as difficult as this one, you can't break out things and say it wasn't really necessary for collection of the note.

If we hadn't made the motion, if we hadn't gone up to the Court of Appeals, I think we would still be waiting in this court for a trial date.

THE COURT: Well, I am not so sure of that. I would have to tell you that this case was reassigned to me by the Assignment Committee at the request of Judge Ryan, and it was only after my name came out of the Assignment Committee's wheel and as I was preparing to deal with you fellows and push you to trial that I suddenly came upon this brief per curiam decision of the Court of Appeals to the effect that

the case ought to be tried by some date which had already gone by.

So, frankly, from the viewpoint of this particular Judge for this particular court, it seems quite evident that the case came on for trial for quite different reasons.

MR. LABATON: Your Honor, that was in February of 1974. In the summer and fall of 1973, we had to make a decision as to whether to prosecute an appeal to pay the printing bills and to spend the time necessary. At that stage, I personally spoke to Mr. Kaplan, Judge Ryan's law clerk, and I asked him whether in his judgment if we made an application for an immediate trial what our chances were, and he said he would have no way of predicting it.

THE COURT: Well, I think that was an honest answer.

MR. LABATON: And it was an honest answer, but it was in that context, with a client faced with no income whatsoever, that we had to make the judgment to go ahead.

THE COURT: Well, quite frankly, what happened was, as we know it, and it is a tragedy for everybody concerned -- perhaps "tragedy" is an excessive word for the situation -- but we know now that Judge Ryan was ill, and fortunately he is recovered and is recovering daily, and he was, at it turned out, really unable, physically and otherwise unable to

take you, and that certainly wasn't your fault, but it was not Titan's fault, either, and therefore I am wondering, under these somewhat unusual and difficult circumstances just how to assess the situation.

MR. COOPER: Your Honor, would you brook an interjection at this point by me?

THE COURT: Surely.

MR. COOPER: I think it ought to be viewed in this light, Judge. There was a wilful default on the payment of interest.

THE COURT: Well, I have already, of course, digressed a bit in another context, to be sure.

MR. COOPER: The point was that had there been no wilful default on the payment of interest, we would not have moved for that early trial. In other words --

THE COURT: No. I understand.

MR. COOPER: In other words, all of the spurs were coming out of that.

THE COURT: You don't have to push that. I have already told you and Mr. Powers, on and off the record, that one thing I have never understood about this litigation, no matter what the views of Titan were, which I assume were bona fide, that they have been defrauded here -- I never understood why they went to the extreme step of stopping those

payments. They could have paid them into escrow, and a whole lot of problems that have tortured both sides, or at least both counsel here, would have been avoided.

That is, at least, my judgment and has been ever since I came into contact with you and this case.

So you are right. That's got to be looked into.

Now, here is another problem, Mr. Labaton. We are in the position where you and Mr. Cooper have, frankly, told Mr. Powers and this Court, "We do not have any specific time sheets as such, and therefore there is no evidence of a breakout of exactly what this time shown on Plaintiff's Exhibit 1 for each lawyer was devoted to."

Now, of course, you and I and Mr. Powers -- particularly you two, because you were there -- can remember by looking at the months; you know pretty much what was going on, so you know what a great deal of this time in large measure was devoted to. I can understand that. I suppose your answer would be just what I said, plus this: You would say, "Look: whether you take Mr. Powers' arguments that the notes at such and such a time were only so much because the holders in due course having a certain number of them" -- and so on and so on -- "the fact was in this law suit we at this law firm expended this time."

You can't break it out. We recognize that. You

can't break this out with specificity, partly because of a change in your record keeping and partly because of other problems. "But, really, if we could, does it really make that much difference?"

Isn't that your argument?

MR. LABATON: It is, better than I could state it.

THE COURT: Because Mr. Powers was there, you were there, you did these things; they were part of the warp and woof of this case, and to follow the reasoning of this Court in Tartel -- It so happens that Titan got to the courthouse first -- you had to assert your claim for the notes as a counterclaim. You had to successfully defend against Titan's claims, otherwise the notes would have been a nullity, and that was it.

Fair enough. Is that about it?

MR. LABATON: That is well stated, your Honor.

THE COURT: Well, I just want to make sure I understand you.

Well, now, how about this point of Mr. Powers that: "Look: accepting all this, at least arguendo, is it rational and fair to charge Titan anywhere near what you would charge a normal client if you were charging on a time basis, getting your preferred rates in your office, not to mention going even further and charging him a little more than that, be-

cause $250,000 comes out to quite a bit more than your normal time charge?" And doesn't he have a pretty good equitable argument there? Because, as he points out, Faggen is getting this.

MR. LABATON: That's the point I was trying to make, your Honor. We are not getting this. Faggen is getting this. And Faggen is paying more than the $250,000. He is only getting a partial credit for the fee, and what he is really entitled to one could well argue. We haven't argued, but we could argue what he is really entitled to is what he bargained at arm's length to pay us, because that was really necessary to collect the note.

We could have put in an application for $900,000, your Honor.

THE COURT: Well, I know you could have.

MR. LABATON: No; we could have,and we could argue it on that ground.

THE COURT: Well, I am glad you did not. I think that would be a little much.

MR. LABATON: But it is not we who are seeking a windfall, and it is not Faggen who is seeking a windfall. He is seeking a partial credit for a fee which was necessitated solely by virtue of the plaintiff's default on the notes, and for that he is entitled to a reasonable sum based on a

number of standards, one of which was the fact that he wasn't paying us totally on a time basis but was paying us on a contingent basis, and his contingent arrangement was a reasonable contingent arrangement, based upon arm's length negotiations with us.

MR. COOPER: Your Honor, one other point I would like to add to what Mr. Labaton just said, and that is that your Honor is probably familiar with the fact that in -- Oh, I don't know -- the overwhelming number of notes that are signed provide for a percentage of the note to be paid as reasonable counsel fees, and they invariably run anywhere from fifteen to twenty-five per cent of the face value of the note.

Now, in State Court one of the cases we cited there, the amount charged as counsel fees in that case was the Manufacturers case, fifteen per cent. Now, it had nothing to do with time or anything else, but, as your Honor observed when we were here last, that in this court you look towards time as one of the essential factors.

The only point I am making is that in the world of issuing notes and placing obligations on parties to pay reasonable counsel fees for collections, the person who is actually the obligor is attempted to be discouraged from raising the specious claim for failing to pay an obligation

that the parties at the outset expected would be paid.

Now, certainly what is generally the practice in the field is that counsel fees on notes must be taken into consideration in this case as well.

MR. POWERS: Your Honor, could I talk to that? I have got some cases I would have submitted, but they are not in hand today, and I would like to submit them.

THE COURT: Are you finished?

MR. COOPER: Yes.

THE COURT: Now, Mr. Powers, you have been raising your hand. What's on your mind?

MR. POWERS: On page 18 of the affidavit I put in authorities on the damage issue, and I gathered together some of the attorney's fee issue cases as well.

THE COURT: Wait a minute. You are talking about some material during the trial, now?

MR. POWERS: No. In the post-trial motion.

THE COURT: All right. I don't have those papers.

MR. POWERS: I tried a case just like this before Judge Levet, a couple of years ago, in which there was a contingent fee arrangement between the lawyer and client, and there was an indemnification covenant in an acquisition contract which was much broader than that in these notes, and it was held by Judge Levet, in an unreported decision

cited in that paragraph you have before you, sir, that the contingent fee retainer agreement was irrelevant. The issue was reasonable fees on standard quantum meruit.

THE COURT: I agree with you. The only possible significance of the fee arrangement that Mr. Cooper's firm has with Mr. Faggen is, just by way of background -- and it might also case some outside light on where the outer limits might be from an argument point of view -- but I agree with you: the legal criteria are as you say.

MR. POWERS: The other thing: these are not notes; these were investment securities to the tune of $5,500,000 under the UCC, and this kind of document has a reasonable attorney's fee clause. It doesn't have percentages as a matter of course, and I think that what happens with a small loan in dealing with a bank is irrelevant to what should happen in this kind of a case, where you've got a quantum of effort that can be fairly well identified, what was spent on collecting, and when I roughed out this $35,000 figure, I really tried to give Mr. Cooper the benefit of the doubt on the time, and I don't think in his testimony he disagreed with me too much on the number of hours of depositions, number of hours in court.

It was a rough-and-ready standard that I put in but not an unreasonable standard. I tried to be realistic

about it.

THE COURT: All right. Well, gentlemen --

MR. POWERS: I need that document back. Maybe I could read the citations into the record, if you need them.

THE COURT: No. I am familiar with the case. I just wasn't aware of what you were talking about.

MR. POWERS: The key is in in Re Campbell Estate, 27 New York Supp 2nd 831.

THE COURT: Well, gentlemen, I realize that both sides, with all their other agonies and problems, are anxious to get this matter resolved which we expressly carved out of the judgment file in this case and set down for separate proceedings so that this hearing could be held and that a supplemental judgment will be entered in favor of Mr. Faggen as to the extent he might be entitled to reasonable attorney's fees under the circumstances of this case.

In Tartel versus Chelsea National Bank, this Court, 351 Fed Supp 1071 and particularly at page 1079 et seq., dealt with a similar note covenant or provision. When I say "similar", I hasten to add that the language in Tartel in that case in here is quite different, as counsel have brought to my attention as recently as moments ago.

Nevertheless, in that case, this Court found that the New York courts do enforce covenants of this kind and that

the standard is not the kind of fees that a private agreement between client and a law firm might support, or not as a contency fee arrangement might support, but really the test is what is fair and reasonable, given the circumstances of the litigation having to do with the notes in whole or in part and the reasonableness of the amounts centering upon the litigation insofar as it affected the notes in question.

Both sides have submitted various authorities here, some of which are more directly related than others. I have already noted that the recent decision of our Court of Appeals in what is known as Grinnell -- that is a decision written by Judge Moore -- although somewhat instructive and illuminating really isn't precisely in point. Perhaps a closer case in point of recent vintage in our Court of Appeals is the McFarland case, which arose between private litigants who were here in this court apparently on diversity grounds, that case being Knapp versus McFarland, 457 F 2nd [illegible]. There are many decisions bearing that title in our Circuit Court, including one written by me, which had nothing to do with legal fees. The citation I just gave does.

Now, I have attempted to evaluate this matter pretty much as Mr. Powers has argued and as I think really Mr. Labaton and Mr. Cooper agree. There is no reason to suppose that the time, in terms of hours, which has now been

corrected from what was originally asserted in the Cooper affidavit supporting this application and what we call now Plaintiff's Exhibit 1 -- there is no doubt that those hours are probably correct.

There is also no doubt, as has been conceded, that we don't know exactly what the lawyers did in those hours at those times, except we know generally because of the course of the litigation, which is shown by the file here in this court.

I think the significant time devoted to this case -- and I so find -- is that expended by Messrs Cooper and Labaton. As Mr. Cooper has testified during all relevant periods here, his firm had a preferred hourly charge for him of $100 and a preferred hourly charge of $80 for Mr. Labaton. I do not think that it would be fair to compute any fee here on those preferred time rates, not because I think that Messrs Cooper and Labaton aren't worth it -- given the cost of running a law office in mid-town Manhattan today they may be worth more than that at this moment, to be perfectly blunt about it -- but I don't think that is a fair standard to be used against Titan, which has got only the obligation of paying a reasonable fee, not a preferred rate by a given law firm, whatever the rate may be and however sensible it may be from the law firm's point of view.

It is very difficult -- in fact, it is really impossible to segregate out any portions of this litigation, whether in the trial court or in the Court of Appeals, as being devoted exclusively to the notes or being incidental to the notes or anything of that nature. Put differently, as I pointed out in the case of Tartel versus Chelsea Bank, the fact is that Titan brought this suit, as it clearly was entitled to, under the Federal securities laws, and for various pendent claims.

Titan got to the courthouse first, which, again, was its prerogative.

I have long ago agreed with Lawrence Powers, Esq. that in fixing fees this Court should never do anything so irrational as to penalize Titan for invoking, as it was its right, this Federal remedy in this particular Federal Court. I have that consideration, and I hope to have that consideration in mind as well.

I note also that Paragraph or Covenant 8 of the notes prescribes as follows:

"In the event that legal action becomes necessary to enforce the terms and conditions of this note, the losing party in such legal action shall pay all the incidental costs and reasonable attorney's fees incurred by the prevailing party."

I read this in two significant respects as follows:

First, I read this to really incorporate the reasonable standard argued for by Mr. Powers on behalf of Titan. Second, I think that this action, most specifically, of course, as pertains to Mr. Faggen's counterclaim, was necessary in order to enforce the terms and conditions of the note or some of them. It really doesn't matter how many. The fact is that Faggen had to bring the counterclaim in order to assert his right to some or all of these notes.

Therefore, in trying to balance all these circumstances, I have endeavored to credit mainly the time of Messrs Cooper and Labaton and really ignore the time spent by other lawyers, with the exception of Joel Pfeffer, and I will credit his time approximately one half of the total hours he spent.

Now, as I recall it, Mr. Cooper testified that where possible the firm endeavored to charge $50 an hour for Pfeffer's time here at all relevant periods of 1972 to early 1974. My understanding also is from the affidavit and testimony that the Cooper firm is making no specific claim for disbursements. They are asserting that their fee as requested shall be deemed to include disbursements.

Am I correct about that?

MR. COOPER: That's correct, your Honor.

Your Honor, I want to make it clear that that is exclusive of the bill of costs which we have entered.

THE COURT: Oh, no. Statutory costs will be separate. I am just asking for your own disbursements.

MR. COOPER: No. That is inclusive of our own disbursements.

THE COURT: Well, I think that the only reasonable accommodation I can reach in trhing to balance all these factors is that crediting the entire amount of time spent by Messrs Cooper and Labaton, crediting half of the time of Attorney Pfeffer as being essentially related to the effort of Faggen to collect or enforce the notes or a majority of them, and then reducing their regular or preferred time charges, I come out to a total of $75,520 as being fair and reasonable under these circumstances.

Now, I hasten to add that this is by no means to be construed as an indication that somehow because of this reduced figure the true worth on the open market of the services of Scheib, Shatzkin & Cooper is in this amount. Quite to the contrary. I am only assessing this in the light of all the circumstances and what is reasonable to be done and charged to Titan and awarded to Faggen.

Whatever arrangements Faggen may have made with Scheib, Shatzkin & Cooper are Faggen's business, of course,

but I do not think that this Court should allow Titan to be bound by those arrangements for the purpose of fixing fees.

The amount of which I award, of $75,520, is to be the subject of a supplemental judgment to be entered in favor of Faggen as against Titan. It is to be deemed to include disbursements.

Is there anything further that either party would like this Court to make a specific finding on?

MR. COOPER: I have none, your Honor.

THE COURT: Mr. Powers?

MR. POWERS: No, sir.

THE COURT: All right. Now, gentlemen, off the record --

(Discussion off the record.)

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